TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 772

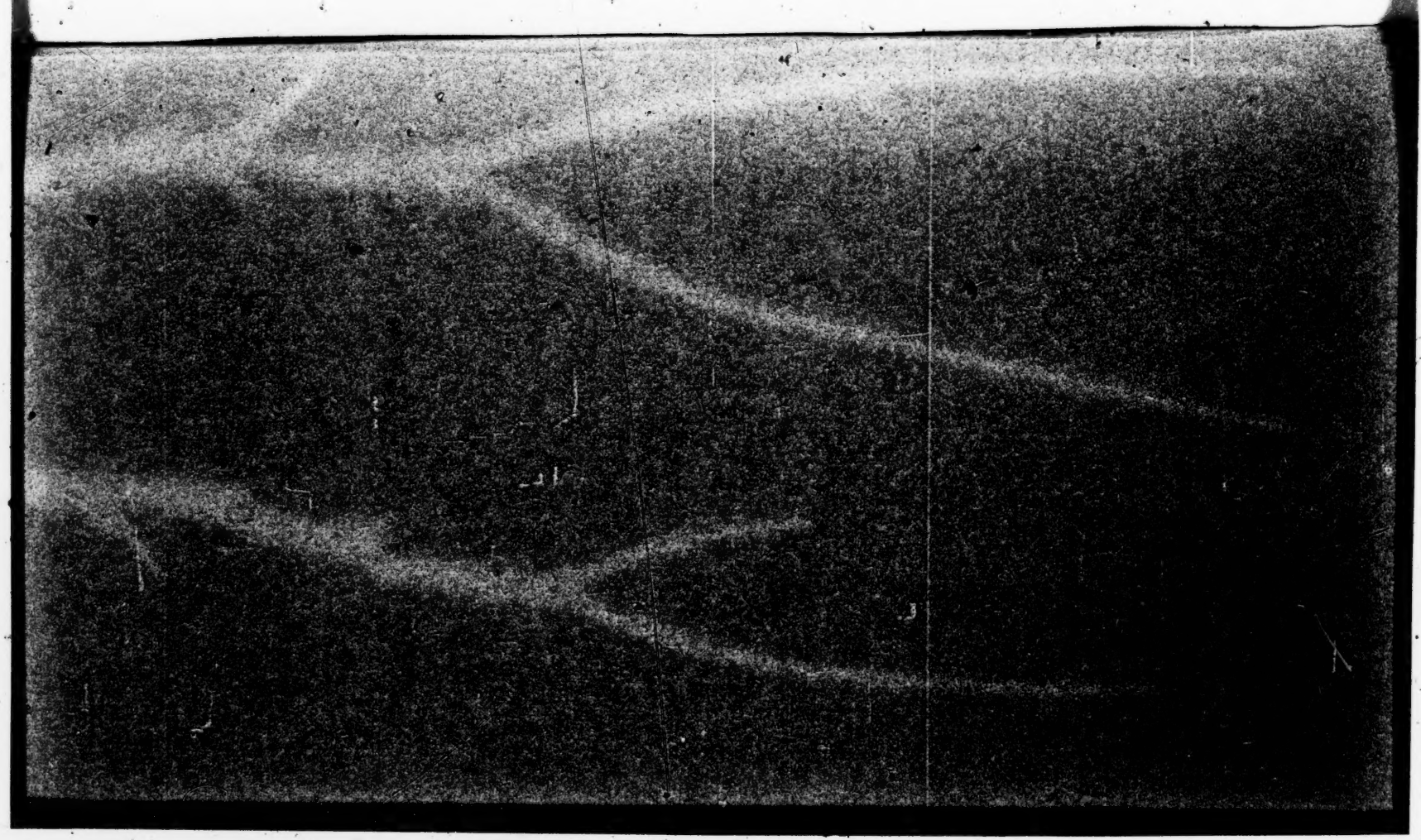
HOWARD MORF, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PACIFIC WHOLESALE AUTOMOBILE COMPANY, APPELLANT,

vs.

JOHN D. BINGAMAN, COMMISSIONER OF REVENUE FOR THE STATE OF NEW MEXICO

APPPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

FILED FEBRUARY 21, 1936.



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[fol. 3]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW MEXICO

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, Plaintiff,

vs.

JOHN D. BINGAMAN, Commissioner of Revenue for the State of New Mexico, Defendant

COMPLAINT IN EQUITY—Filed Aug. 23, 1935

Comes now the plaintiff, and for cause of action against the defendant alleges as follows, to-wit:

I

That plaintiff is a resident and a citizen of the City of Los Angeles, County of Los Angeles, State of California; that plaintiff is engaged in business under the firm name and style of Pacific Wholesale Automobile Company in said City, County and State aforesaid; that plaintiff has duly and regularly filed and registered said firm name as required by the laws of the State of California; that defendant, John D. Bingaman, is the duly appointed, qualified and acting Commissioner of Revenue for the State of New Mexico and is a resident of said state and that there is a diversity of citizenship.

II

That the amount of money involved in this litigation is in excess of Three Thousand Dollars, exclusive of costs and [fol. 4] interest.

III

That at the 12th regular session of the legislature of the State of New Mexico, an Act to amend Chapter 139 of the Session Laws of 1933, State of New Mexico, relating to registration fees for motor vehicles, was passed, being House Bill #71, Chapter 56, Session Laws of 1935 of the

State of New Mexico, which Act was approved February 21st, 1935 and has become a law of the State of New Mexico; that a copy of said Act is attached hereto marked Exhibit "A" and made a part hereof.

IV

That said Act, among other things, provides as follows, to-wit:

"(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the commis- [fol. 5] sioner of revenue of the State of New Mexico upon application on such form as said commissioner may prescribe and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. All permits so issued shall be evidenced by a certificate, issued by said commissioner, which shall show upon the face thereof the registration number assigned to each such vehicle, the name and address of the owner thereof, the manner of transportation thereby authorized and a description of the vehicle so registered, including the engine number thereof. Such certificate shall be carried at all times by the person in charge of such vehicle or vehicles. A suitable tag or placard shall be issued by the commis-

sioner with such certificate and shall be at all times displayed on each such vehicle, whether the same is being so transported singly or in a caravan. No such permit, certificate, tag or placard shall be issued upon or in connection with the transportation of any vehicle other than the one for which the same is issued."

V

That plaintiff is engaged in the business of buying, selling and trading of automobiles and his principal place of business is in the City of Los Angeles, County of Los Angeles, State of California; that he has complied with the laws of said City, County and State in regards to such business.

That he has been engaged in such business for several years last past and has succeeded in building up a business, the value of which he alleges to be in excess of $25,000.00, and from which he has derived a good income and livelihood.

VI

That plaintiff is not now, nor has he ever been, engaged [fol. 6] in business in the State of New Mexico.

VII

That plaintiff, in the operation and conduct of his said business, on numerous and divers occasions, has purchased and desires to continue to purchase, automobiles in various Eastern and Southern States of the United States, and drives or causes them to be driven from said places of purchase to the City of Los Angeles, State of California, for the purpose of sale and trade; that during the period said automobiles are so driven from various points of purchase in other states to the State of California, plaintiff is engaged solely in interstate commerce; that the purchasing of said automobile as aforesaid is essentially necessary to the continued conduct of his business, and that if he is deprived of the right to drive or cause said automobiles to be driven from the point of purchase as aforesaid to the State of California, or if he is required to pay an exorbitant tax in interstate commerce, he will lose his business and thereby suffer an irreparable injury.

VIII

That the shortest and most convenient route over which said automobiles so purchased as aforesaid may be driven or towed to California is through the State of New Mexico; that in order to avail himself of this short route it is necessary for him to drive or tow said automobiles upon and over the public highways of the State of New Mexico; that plaintiff enters said State of New Mexico at the City of Las Cruces and drives on the public highway to Lordsburg, a distance of approximately one hundred and eighty one miles; that the time it takes to drive said one hundred and eighty one miles is approximately six hours; that said route through the State of New Mexico is the shortest and most convenient route.

[fol. 7]

IX

That under and by virtue of the provisions of said Act of the State of New Mexico hereinabove mentioned, plaintiff has been required, by defendant, to pay to defendant, his agents, servants and employees, the sum of $7.50 for each vehicle driven by use of its own power and a fee of $5.00 for each vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power; that plaintiff has paid said money under duress and protest to said defendant, his agents, servants and employees; that there is no provision in the Act herein referred to or the Laws of the State of New Mexico whereby plaintiff can recover back said moneys so paid under duress and protest in the event said Act is held to be unconstitutional as to this plaintiff as hereinafter alleged;

X

That the distribution and disposition of the fees collected and to be collected from this plaintiff under the provisions of the foregoing statute are as provided in Section 1 of Chapter 93, Session Laws 1935, of the State of New Mexico, a copy of which said section is hereto attached, marked Exhibit "B" and made a part hereof.

XI

That said Act known as House Bill #71, Chapter 56, Session Laws of 1935 of the State of New Mexico is unconsti-

tutional upon the following grounds and for the following reasons, among others, to-wit:

(a) That said Act is in contravention of, and repugnant to Article I, Section 8 (commonly referred to as the "commerce clause") of the constitution of the United States, in this,

That said Act places a direct burden upon interstate commerce, and is not for the purpose of regulation but is a [fol. 8] revenue measure only;

That said Act is not based upon any reasonable basis of licensing, but is arbitrary, discriminatory and unfair and its effect is the burdening of business in interstate commerce and so intended to, does and will so cripple plaintiff's business in interstate commerce that it will be impossible for plaintiff to continue in said business;

That said Act is in no sense a police regulation of the use of the highways of the State for the protection of the health, morals or safety of the public.

(b) That said Act is in contravention of, and repugnant to the 14th amendment to the Constitution of the United States, in this;

That it deprives this plaintiff of his property, to-wit: moneys he is required to pay for use of the public highways of the State of New Mexico, without due process of law;

That it denies to this plaintiff, when engaged in interstate commerce in the State of New Mexico, as aforesaid, of the equal protection of the law;

That said Act is discriminatory in that it applies only to out of state dealers and does not apply to dealers within the State of New Mexico;

That it applies only to those persons, firms or corporations using the highways for transportation of motor vehicles for purposes of sale and does not apply to other persons using said highways for pleasure or purposes other than sale, which distinction and classification is not reasonable.

That said license tax is wholly disproportionate to other taxes, fees or other licenses charged by the State of New Mexico either for the registration of vehicles in said state or for vehicles using the highways in said state.

That said license tax is exorbitant and arbitrary and unfair to such a degree that the interstate business in which

[fol. 9] plaintiff is engaged in the State of New Mexico will return a revenue to said state in proportion, far in excess of other fees, licenses or taxes charged other persons for the use of the highways in said state.

XII

Plaintiff further states and alleges that he desires to continue to use the highways of the State of New Mexico for the purpose of transporting motor vehicles in interstate commerce as hereinbefore alleged and that the continued use of said highways is absolutely essential to the conduct and operation of plaintiff's business; that if he is denied the right to so use said highways or is charged and forced to pay an exorbitant and arbitrary fee for such use, he will be unable to continue in business and the effect will be the same as if he was arbitrarily denied the right to so use said highways.

XIII

Plaintiff further alleges and states that said defendant has heretofore required this plaintiff, when transporting his motor vehicles on its or their own wheels over and across the highways of the State of New Mexico, for the purpose of selling said motor vehicles in the State of California, to pay to said defendant, his agents, servants or employees the sum of $7.50 for each such vehicle transported by use of its own power and the sum of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by use of its own power, all as is contemplated by the provisions of said sub section (d) of Section I of Chapter 56 of the 1935 Session Laws of the State of New Mexico; that said defendant intends and threatens to continue to enforce, as against this plaintiff, the provisions of said statute and to require him to pay the said fees, charges and sums in said statute provided and herein last above set out; that said defendant intends and threatens to invoke as against this plaintiff, the penalties by the laws of said State of New Mexico prescribed for any [fol. 10] failure on the part of this plaintiff to pay the fees, charges and sums hereinabove mentioned for his use of the highways of said state in the manner and for the purposes above set forth, and to thereby deny to this plaintiff the use of said highways in his lawful interstate commerce as

aforesaid, unless he shall first pay to said defendant said fees and sums above mentioned; that there is no provision of law whereby and whereunder this plaintiff may recover from said defendant or from the State of New Mexico any such sums, fees or charges by him paid or to be paid said defendant as aforesaid; that if said defendant be permitted to carry out his aforesaid threats and intentions and to enforce as against this plaintiff the provisions of said statute and unless said defendant, his deputies, agents and servants be enjoined and restrained from so doing, this plaintiff and his aforesaid business will suffer irreparable loss and injury and the rights of this plaintiff in the premises and the protection to him guaranteed under the provisions of Section 8 of Article I and under the provisions of the 14th amendment to the Constitution of the United States will be violated, destroyed and held for naught.

That said plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays the Court:

I. For a temporary restraining of this Court directed to the said defendant, his agents, servants and employees and all persons acting under and through his authority as commissioner of revenue for the State of New Mexico, enjoining and restraining them and each of them from enforcing or attempting to enforce as against this plaintiff the provisions of said Chapter 56 of the 1935 Session Laws of the State of New Mexico.

II. For a citation directed to said defendant ordering him to appear before a three judge court at a time and place to be hereafter fixed by order of Court and there show cause, if any he has, why an interlocutory injunction [fol. 11] should not be issued herein as is by law and the practice of this Court contemplated.

III. For a final and permanent injunction upon hearing of the merits of this cause before a three judge court, finally and permanently enjoining and restraining the defendant, John D. Bingaman, as commissioner of revenue of the State of New Mexico, his agents, servants and employees and all other persons acting under or through his authority as such commissioner from enforcing or attempting to enforce as against this plaintiff the provisions of said Chapter 56 of

the 1935 Session Laws of the State of New Mexico, and from exacting or attempting to exact from this plaintiff the payment of any sums, charges or fees in said statute unlawfully required of him to be paid by reason of his aforesaid use and intended use of the highways of the State of New Mexico in the manner herein set out above.

IV. Said plaintiff prays for such other and further relief in the premises as to the Court may seem adequate, equitable and just.

Pierson & Block, by Ralph K. Pierson, Compton, California; Geo. E. Remley, Santa Fe, New Mexico, Attorneys for plaintiff.

Duly sworn to by Ralph K. Pierson. Jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO BILL OF COMPLAINT

Chapter 56

An Act to Amend Chapter 139 of the Session Laws of 1933 Relating to Registration Fees for Motor Vehicles

House Bill No. 71; Approved February 21, 1935

Be it Eacted By the Legislature of the State of New Mexico:

Section 1. That chapter 139 of the Session Laws of 1933, be and the same is hereby amended to read as follows:

"11-321. Registration by non-residents.

"(a) A non-resident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the state, county or other place for which the owner is a resident and which at all times when operated in this state had displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without [fol. 13] registering such vehicle or paying any fees to this state, during a period of three months from the time such vehicle is first brought into this state.

"(b) A non-resident owner of a foreign vehicle operated within this state for the transportation of persons or property for compensation or for the transportation of merchandise, shall register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state; Provided, however, that motor vehicles properly licensed in any other state or country, operated for compensation or hire, which are used exclusively in the transportation of livestock, lumber, farm or dairy products, from the place of production to market, or in the transportation of a return load of livestock, farm or dairy products or lumber, may be allowed to make trips within the state and remain on each trip within the state not exceeding four days, without being registered or required to pay the mileage or other fees, in this state, in the event that under the laws of such other state or country, similar or like exceptions are granted to motor vehicles registered under the laws of and owned by residents of this state.

"(c) Every non-resident, including any foreign corporation carrying on business within this state and owning and regularly operating in such business any motor vehicle, trailer or semi-trailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state Provided, however, salesmen, agents or [fol. 14] representatives with no permanent place of business in this state and who are traveling through the State for the purpose of calling on retailers, wholesalers or jobbers for the purpose of taking orders for future delivery, shall be required to register any motor vehicle used by them in such business and pay therefor a registration fee of Five ($5.00) Dollars, for which an appropriate license tax shall be furnished by the motor vehicle commissioner.

"(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Commissioner of Revenue of the State of New Mexico upon application on such forms as said commissioner may prescribe [fol. 15] and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. All permits so issued shall be evidenced by certificates, issued by said Commissioner, which shall show upon the face thereof the registration number assigned to each such vehicle, the name and address of the owner thereof, the manner of transportation thereby authorized and a description of the vehicle so registered including the engine number thereof. Such certificate shall be carried at all times by the person in charge of such vehicle or vehicles. A suitable tag or placard shall be issued by the Commissioner with such certificate and shall be at all times displayed on each such vehicle whether the same is being so transported singly or in a caravan. No such permit, certificate, tag or placard shall be used upon or in connection with the transportation of any vehicle other than the one for which the same is issued."

Section 2. That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico that this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this Act shall take effect and be in full force and effect from and after its passage and approval.

[fol. 16] SUBSTITUTED EXHIBIT "B" TO BILL OF COMPLAINT

Chapter 93

An Act Amending Section 11-311 of New Mexico Statutes, Annotated, 1929 Compilation as Amended by Section 6, Chapter 169 of the Laws of New Mexico of 1933 Which Amended Section 6, Chapter 77 of the Laws of New Mexico of 1931, Relating to the Disposition of Registration Fees, Collected upon the Registration of Motor Vehicles.

House Bill No. 17; Approved February 25, 1935

Be it enacted by the Legislature of the State of New Mexico;

Section 1. That Section 11-311 of the New Mexico Statutes, Annotated, 1929 Compilation, otherwise known and designated as Section 31 of Chapter 119 of the Laws of 1929 as amended by Section 6 of Chapter 77 of the Laws of 1931 and as further amended by Section 6 of Chapter [fol. 17] 169 of the Laws of 1933, be and the same is hereby amended to read as follows:

11-311. Disposition of Fees.

The fees collected under the provisions of this Act shall be paid over to the state treasurer not later than the close of the second business day after their receipt. Not to exceed Six per cent thereof shall be covered into the state comptroller motor vehicle fund, and used to defray the expense of the administration and enforcement of this Act and the discharge of such other duties as may be imposed upon the department by law. The remainder thereof shall be distributed by the state treasurer on or before the tenth day of the month next after their receipt, as follows:

Forty-five per cent thereof shall be placed to the credit of the state road fund to be used and disbursed as other moneys in the state road fund.

Fifteen per cent thereof shall be paid to the county treasurers of the several counties in this state and distributed between the respective counties in proportion that the total amount of registration fees paid for motor vehicles each

county bears to the total amount of such registration fees paid for such vehicles owned in the state, to be credited to the county road fund of said respective counties, and used for the improvement and maintenance of the public roads therein, and to pay for the acquisition of rights of way and [fol. 18] material pits at the request of and by agreement with the state highway commission.

Fifteen per cent thereof shall be credited to the state general fund.

Twenty-five per cent thereof shall be paid over to the county treasurer of the several counties of this state and distributed between said respective counties in the proportion that the total amount of registration fees paid for vehicles owned in each county bears to the total amount of such registration fees paid for vehicles owned in the state, and the county treasurer of each county shall distribute the moneys paid to him under the provisions of this paragraph, when received, between the county and school district funds of such county and the various cities, towns and villages therein, in the same proportion that the receipts from general property taxes, other than taxes for state purposes, received by said treasurer for the year in which such distribution is to be made, are so distributed in such county betwen said county and school district funds and said cities, towns and villages therein. Provided that in the counties wherein are located cities, towns or villages incorporated, organized and operating under special act, the country treasurer of such county shall pay to the treasurers of said cities, towns or villages a proportionate amount of said money, by him to be distributed in the proportion that the receipts from general property taxes in said cities, towns or villages, bear to the total receipts from general property taxes other than taxes for state purposes received by the county treasurers and the collectors of said cities, towns or villages in the year in which said distribution is to be made. And Provided further [fol. 19] that for the purpose of effecting an equitable distribution in said counties, the collectors of said cities, towns or villages operating under special act shall, on or before the first Monday in October, certify to the county treasurer and to the state tax commission, the assessed valuation and the total tax rate in said cities, towns or villages for such year. The remainder thereof shall be credited to the State Public School Equalization Fund.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed December 24, 1935, Nunc Pro Tunc as of September 13, 1935.

Comes now the plaintiff, and by and under the consent of the defendant in open court granted and by leave of Court first had and obtained, hereby amends his Bill of Complaint in the following particulars, to-wit:

I

That sub-paragraph (b) of Paragraph XI of his said complaint be and the same is hereby amended to read as follows: that said Act is in contravention of and repugnant to the Fourteenth Amendment of the Constitution of the United States in this: that the said defendant and the Port of Entry Board, created, organized, and existing under the provisions of Chapter 136 of the 1935 Session Laws of the State of New Mexico, and their respective agents, servants, and employees, deprive this Plaintiff of his property, to-wit: monies he is required to pay under the provisions of Chapter 56 of the 1935 Session Laws of [fol. 20] the State of New Mexico, without due process of law.

That said Plaintiff, by reason of the premises, is likewise deprived of his property without due process of law in this: that said defendant in enforcing and attempting to enforce as against this plaintiff the provisions of said Chapter 56 of the 1935 Session Laws of the State of New Mexico, is denying unto this plaintiff the right to pay the mileage tax upon the motor vehicles by him driven or caused to be driven through and across the State of New Mexico, which mileage tax is provided for in Sections 6 and 8 of what is commonly called the Port of Entry Act, to-wit: Chapter 136 of the 1935 Session Laws of the State of New Mexico, and is further denying to him the right to elect to register his said vehicles with the Bureau of Revenue and to pay the fees required for licensing of said vehicles or to pay the mileage tax provided for in Section 8 of said Port of Entry Act. That said defendant in enforcing and seeking to enforce the provisions of Chapter 56 of the 1935 Session Laws of the State of New Mexico is further depriving this Plaintiff of his properties without due process of law in this: that the provisions of said

Chapter 56 are repugnant to and are repealed by the provisions of the said Port of Entry Act, to-wit: Chapter 136 of the 1935 Session Laws of the State of New Mexico.

That it denies to this plaintiff, when engaged in Interstate Commerce in the State of New Mexico as aforesaid the equal protection of the law for each and every reason last above in this sub-paragraph set forth; and for the further reason that it denies to this plaintiff the right to elect to pay a tax under the terms of the said Port of Entry Act, as herein above set forth, which right is accorded to [fol. 21] other persons, firms and corporations coming within the provisions of the said Port of Entry Act, as does this Plaintiff

II.

That a new paragraph to be numbered XII B be added to said Bill of Complaint as follows, to-wit: that under and in accord with the provisions of Chapter 136 of the 1935 Session Laws of the State of New Mexico, approved on the 28th day of February, 1935, which said act is a later enactment of the legislature of said State than is Chapter 56 of the 1935 Session Laws of the State of New Mexico approved on the 21st day of February, 1935, this plaintiff is and should be accorded the right and privilege of using the highways of the State of New Mexico in and for his aforementioned interstate commerce business by complying with the provisions of said chapter in and upon payment of the mileage tax in said chapter provided and required to be paid by those who are or may use said highways in Interstate Commerce of the kind and character carried on by this plaintiff as aforesaid; that by reason of the character of the aforesaid business of this plaintiff and the character of business of his use of the highways of New Mexico this plaintiff falls within the classification of said chapter 136, commonly called the Port of Entry Act, and has the lawful right and authority under said act to use said highways for the purposes aforesaid upon payment of mileage tax and further has the lawful right and authority to elect to pay the mileage tax in said Chapter required of him to be paid or to register each of the motor vehicles by him transported or to be transported in the State of New Mexico on the highways thereof with the Bureau of Revenue upon the payment of fees for his license

plates for each of said vehicles and he further states that this right is to him denied by the said defendant and his agents, servants and employees

That said defendant has refused to permit this plaintiff to use the highways of the State of New Mexico for the [fol. 22] purposes aforesaid, upon complying with the provisions of said Chapter 136 of the 1935 Session Laws of the State of New Mexico, but has compelled and threatens to and will continue to compel this plaintiff as a prerequisite to using the highways of New Mexico for the purposes aforesaid to comply with the provisions of said Chapter 56 of the 1935 Session Laws of the State of New Mexico and to pay fees therein provided.

That said Chapter 56 of the 1935 Session Laws of the State of New Mexico, as the same effects the payment of fees by this plaintiff for his aforesaid use of the highways of said State is contrary to and repugnant to and is repealed by the provisions of the said Port of Entry Act, to-wit: Chapter 136 of the 1935 Session Laws of the said State.

Pierson & Block, by Ralph K. Pierson, Compton, California; Geo. E. Remley, Santa Fe, New Mexico, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER—Filed August 23, 1935

It is hereby stipulated by and between Frank H. Patton, Attorney General and Quincy D. Adams, Assistant Attorney General of the State of New Mexico, whose appearance is hereby entered in this cause for and in behalf of the defendant herein, and Pierson & Block and George E. Remley, attorneys of record for the above named plaintiff as follows, to-wit:

[fol. 23] That upon the bill in equity in this cause filed a Temporary Restraining Order may be forthwith entered herein restraining and enjoining the said defendant as prayed for in said bill in equity until the hearing on plaintiff's application for an Interloctutory Injunction shall be had.

It is further stipulated that such Temporary Restraining Order shall issue out of said Court upon the filing herein of the plaintiff's bond in manner and form by law required in the sum of $1500.00, provided, however, that said Temporary Restraining Order shall be in force and effect only during the period of time the bond herein mentioned is sufficient to cover the fees of the State of New Mexico which it would be entitled to collect except for said Temporary Restraining Order and that during the time said bond is not sufficient to cover such fees said Temporary Restraining Order shall be suspended and of no force and effect until such time as plaintiff herein files a sufficient additional bond, at which time said Temporary Restraining Order shall continue to be in full force and effect; and

It is further stipulated that the hearing upon plaintiff's application for Interlocutory Injunction may be heard between the 15th day of September, 1935 and the 15th day of October, 1935.

It is further stipulated that defendant may have to and including September 10th, 1935 to file his return to order to show cause and plead to plaintiff's bill.

Dated at Santa Fe, New Mexico, this 23rd day of August, 1935.

Pierson & Block, by Ralph K. Pierson, Geo. E. Remley, Attorneys for Plaintiff. Frank H. Patton, Attorney General for the State of New Mexico, by Quincy D. Adams, Assistant Attorney General for [fol. 24] the State of New Mexico, Attorneys for Defendant.

In United States District Court

Temporary Restraining Order and Rule to Show Cause—Filed August 23, 1935

And now, to-wit, on this 23 day of August, 1935, this cause coming on to be heard before the Honorable Colin Neblett, Judge of the United States Court for the District of New Mexico at Santa Fe in said District upon the bill in equity by the plaintiff herein filed and upon the stipulation of the attorneys record for said plaintiff and for said defendant and it appearing to the Court from said bill and from said stipulation that a Temporary Restraining Order should issue out of this Court in this cause.

Now therefore it is ordered, considered, adjudged and decreed by this court as follows, to-wit:

That the defendant, John D. Bingaman in his capacity as Commissioner of Revenue for the State of New Mexico and his agents, servants and employees and all other persons acting under and through his authority or by virtue of his said office, be and they hereby are severally enjoined and restrained specially and until the hearing on plaintiff's application for an Interlocutory Injunction, from the enforcement of the provisions of House Bill #71, Chapter 56 Sessions Laws of 1935 of the State of New Mexico, as against the plaintiff herein.

It is further ordered that plaintiff herein file his bond in the sum of $1500.00; and

It is further ordered that said Temporary Restraining [fol. 25] Order shall be in full force and effect only during the period of time the bond herein mentioned is sufficient to cover the fees of the State of New Mexico, which it would be entitled to collect except for the issuance of this Temporary Restraining Order; and that during the time said bond is not sufficient said Temporary Restraining Order shall be suspended and of no force and effect until such time as plaintiff herein files a sufficient additional bond to cover said fees at which time said Temporary Restraining Order shall be restored and continue in full force and effect. Said bond or bonds shall be in the form and upon the conditions required by law.

It is further ordered that defendant herein appear before a three judge court consisting of three United States Judges, one of whom shall be a Circuit Judge, sitting to hear this matter at the United States Court House, Albuquerque, New Mexico, on the date to be set by Court, and then and there to show cause, if any he has, why an Interlocutory Injunction should not issue herein.

It is further ordered that a copy of this order be served on the defendant, John D. Bingaman, and that at least five days notice of the hearing aforesaid be given respectively to the Governor and Attorney General of the State of New Mexico and to said defendant.

Dated at Santa Fe, New Mexico, this 23rd day of August, 1935.

Colin Neblett, District Judge.

OK. QDA.

2—772

[fols. 26 & 27] IN THE UNITED STATES DISTRICT COURT

SUBPŒNA IN EQUITY—Issued August 23, 1935 and Filed August 26, 1935

The President of the United States of America to John D. Bingaman, Commissioner of Revenue for the State of New Mexico, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpœna at the Clerk's office of the United States District Court for the District of New Mexico, at Santa Fe to answer unto the bill of complaint of Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Colin Neblett United States District Judge at Santa Fe this 23rd day of August A. D. 1935.

[illegible] D. Bryars, Clerk.

Memorandum

The Defendant in this case is required to file an answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

Copy of Complaint attached.

Pierson & Block, Esquires, Compton, California; and Geo. E. Remley, Esquire, Santa Fe, New Mexico, Attorneys for Plaintiff.

[fol. 28] IN UNITED STATES DISTRICT COURT

ACCEPTANCE OF SERVICE OF SUBPŒNA AND ENTRY OF APPEARANCE—Filed August 26, 1935

John D. Bingaman, the duly appointed, qualified and acting Commissioner of Revenue for the State of New Mexico, defendant in the above entitled cause, and Frank H. Patton, Attorney General of the State of New Mexico, do each

hereby severally acknowledge service of subpœna in the above entitled cause and that they and each of them have this day received a true and correct copy of the bill in equity and of the temporary restraining order issued out of the above entitled cause on this day, and the said Frank H. Patton, Attorney General as aforesaid, and Quincy D. Adams, his assistant do hereby enter their appearance as attorneys of record for and in behalf of the said defendant herein.

Dated this 23rd day of August, 1935.

Frank H. Patton, Attorney General. Quincy D. Adams, Assistant Attorney General. John D. Bingaman, Commissioner of Revenue.

IN UNITED STATES DISTRICT COURT

RETURN TO THE RULE TO SHOW CAUSE AND ANSWER OF JOHN D. BINGAMAN, COMMISSIONER OF REVENUE, ETC.—Filed September 10, 1935

Now comes John D. Bingaman, Commissioner of Revenue for the State of New Mexico, defendant in the above entitled cause, and for return to the rule and order to show cause, and for answer to plaintiff's complaint, alleges:

[fol. 29]

I

As to the allegations of Paragraph I of plaintiff's bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph, except that he admits that the plaintiff is a resident and citizen of the city of Los Angeles, county of Los Angeles, State of California, and that the defendant, John D. Bingaman, is the duly appointed, qualified and acting Commissioner of Revenue for the State of New Mexico, and is a resident of such state.

II

He denies the allegations of Paragraph II.

III

He admits the allegations of Paragraph III.

IV

He admits the allegations of Paragraph IV.

V

As to the allegations of Paragraph V of the bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said pargraph.

VI

As to the allegations of Paragraph VI of the bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph.

VII

As to the allegations of Paragraph VII of the bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph.

[fol. 30]

VIII

As to the allegations of Paragraph VIII of the bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph.

IX

Defendant admits the allegations of Paragraph IX.

X

Defendant denies the allegations of Paragraph X.

XI

Defendant denies the allegations of Paragraph XI.

XII

As to the allegations of Paragraph XII, the defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph.

XIII

Answering the allegations of Paragraph XIII, defendant admits the same, except that defendant denies that if the defendant carries out the threats and intentions referred to in said bill of complaint, and enforces the same against the plaintiff, that the plaintiff and the plaintiff's business will suffer irreparable loss and injury, and further denies that the rights of the plaintiff in the business carried on by the plaintiff will be violated, destroyed and/or held for naught, or that plaintiff will be denied the protection guaranteed to him under the provisions of Section 8 of Article I and/or under the provisions of the Fourteenth Amendment to the Constitution of the United States, and further denies that the plaintiff has no plain, speedy or adequate remedy at law.

XIV

As and for a further return to said order to show cause, and by way of answer to plaintiff's complaint, the defendant states that the bill of complaint herein does not state facts [fol. 31] sufficient to entitle the plaintiff to the relief therein prayed for, nor to any equitable relief.

XV

This Court has no jurisdiction of this cause because the specific facts set forth in the bill of complaint negative the conclusion therein set forth that this suit involves more than Three Thousand Dollars ($3,000.00) exclusive of interest and costs; and it appears from the face of the bill of complaint that the requisite jurisdictional amount is not involved in this suit.

XVI

The plaintiff is not entitled to a temporary injunction herein, to the relief prayed for in plaintiff's bill of complaint, nor to any equitable relief because said bill of complaint does not allege or set forth any facts;

(a) Showing any deprivation of the rights of the property of the plaintiff.

(b) Showing any imposition of any burden on interstate commerce.

(c) Showing any discrimination as between out of state dealers in automobiles and local dealers in automobiles.

XVII

As and for further return to plaintiff's complaint, and by way of further answer thereto, the defendant states that the regulation and charge complained of by plaintiff is not a regulation of or charge made by the state for the transportation of motor vehicles in or across the state, but is a regulation of and charge made for the use of the public highways of the state of New Mexico for that purpose. Defendant further states that the public highways are the property of the state of New Mexico and have been built and are being maintained at a great expense to the said state of New Mexico; that such highways are a valuable facility and that the use of such highways is a valuable privilege; that the use of such facilities as regulated by [fol. 32] said Chapter 56 is a commercial, extraordinary use and that when the highways of the state are so used they are used for direct gain or profit and as a place of business for those engaged in the operations regulated by said Chapter 56; and that the use of such highways as described by plaintiff is of substantial value to the said plaintiff.

XVIII

Defendant further states that the highways of the state of New Mexico, and particularly the highway described in plaintiff's complaint, are regularly and customarily traversed at all hours of the day and night by great number of motor vehicles of every description and by other vehicles and that additional traffic upon such highways adds to and increases the wear of the same and the cost and expense of maintaining them, increases the hazards incident to such use, and increases the cost of supervising and regulating the traffic thereon and that the operations carried on by plaintiff as described in plaintiff's complaint, and by others similarly affected by such Chapter 56, are substantial and involve the movement of a great many motor vehicles and result in a great and substantial volume of such additional traffic.

XIX

That the operations of plaintiff as described by his complaint herein and by others affected by said Chapter 56 are of unusual and dangerous character in that vehicles so moved are customarily and ordinarily moved in long

processions or caravans, that by the use of tow bars or similar attachments the vehicles so moved are usually operated in tandem or in pairs, one car operated by a driver and pulling another driverless car, that such two car units are frequently operated with minimum or inadequate space between them and at varying speeds, the speed of such trains being uniformly slower than the ordinary stream of traffic on inclining grades and frequently on [fol. 33] level roads and frequently at excessive speeds when being moved down grade; that such cars so transported are usually ordinary passenger cars equipped with motive power and brakes originally designed to propel or restrain only one vehicle and that the speed, pickup and braking efficiency of such cars is usually impaired or reduced by the coupling and pulling of one car by another of such cars; that the coupling of such cars usually results in the impaired vision of the driver of the towing car in the rear view mirror; that the close coupling of such cars and their operation in trains makes it difficult for those overtaking or about to pass such caravans to observe the drivers signals as to his intentions as to stopping or turning; that such cars are usually operated by a preponderance of persons as drivers who have no ownership or interest in the same and who are only concerned with securing their own transportation to California or other destination; that such drivers are usually inexperienced, not familiar with the vehicle or vehicles they are operating, not familiar with the highways over which they operate, not accustomed to steady driving and for distances as great as those usually negotiated by such caravans; that only a small percentage of such drivers are paid for their services except in the form of the transportation of their persons to destination; that they are frequently underfed and have been driving or continue to drive such cars for excessively long and strenuous hours upon entering and upon continuing through the state.

XX

That the plaintiff is engaged exclusively in handling used cars or vehicles which have previously been owned by and frequently those which have been operated for many miles by others, and those which have been registered under the laws of some other state; that in order to prevent traffic

in stolen automobiles and to minimize the theft of automo- [fol. 34] biles it is essential and necessary for officials of the state of New Mexico to carefully scrutinize and devote special effort to the traffic in and movement over the highways of such used cars.

XXI

That in order to protect the residents of the state of New Mexico and others of the state in their use of the public highways and to provide for their safety and convenience in such use, and in order to regulate, supervise and control the operations over the public highways by the plaintiff and by others regulated by paragraph (d) of said Chapter 56, it is necessary for the state to maintain a state highway patrol or police force, the maintenance of which is accomplished at a substantial expense to the state of New Mexico.

XXII

That in order to collect and attain efficiency in the uniform collection of the fees imposed under the provisions of said paragraph (d) of said Chapter 56, it is necessary for the state to maintain officers, agents and clerks and to furnish supplies and materials at a material and substantial expense to the state of New Mexico.

XXIII

That in order to protect the safety and convenience of residents of the state and those who use the public highways of the state, and to deter motor vehicle operators from reckless driving upon such highways it is necessary for the state to require the registration and numbering of substantially all motor vehicles used on the public highways of the state for purposes of identification of those who operate such vehicles.

XXIV

That the provisions of paragraph (d) of said Chapter 56 are enacted under and constitute an exercise of both the police power of the state of New Mexico and its right to [fol. 35] exact a reasonable compensation for the use of the state's facilities, and that the fees exacted under such provisions are reasonable, fair and just, and bear a reason-

able relationship to the cost of such regulations and the expense of collecting such fees and to the value of the use of such facilities by the plaintiff and by others affected by the provisions of such paragraph.

XXV

That persons, firms and corporations licensed to do business as dealers under and by virtue of the laws of New Mexico, are, pursuant to said statutes, assigned an identifying number and that plates bearing such number must, by the provisions of said laws, be affixed to all motor vehicles operated over the highways of the state by each of such dealers and that each of such dealers must at all times keep an accurate record of the vehicles upon which each of such plates is used and that such records must be kept within the state and must be, at all times, available for inspection by proper officers or officials of the state. That because of the nature of the business conducted by automobile dealers and particularly the business conducted by dealers in used cars, it is essential and necessary that motor vehicles operated by them, their agents, employees and prospective purchasers, be easily and accurately identified in order to protect the safety and welfare of the residents of New Mexico and others who use the state's highways but that without the provisions of paragraph (d) of Chapter 56 aforesaid, the state has no practical means of identifying vehicles owned and operated on New Mexico highways by dealers not licensed by the state of New Mexico and that the provisions of said paragraph of said Chapter are necessary to classify and to regulate and to identify such operations by non-resident as distinguished from resident dealers, and that the charge made therefor is reason-
[fol. 36] able and necessary to defray the cost of such registration and regulation and that such classification is valid and not discriminatory.

XXVI

That under and by virtue of the laws of the state of New Mexico, persons, firms and corporations engaging in business in New Mexico as dealers in motor vehicles as in said statutes defined, are obliged to and do pay to the state of New Mexico and its various subdivisions other taxes, fees and charges which are not charged against or collected

from such dealers who do not deal in motor vehicles in the state, and that the charge set forth in said paragraph (d) of said Chapter 56, even though it were not applicable to local dealers does not fall with disproportionate economic weight upon the plaintiff and others similarly situated and is not discriminatory.

XXVII

Further answering sub-paragraph (c) of paragraph IX of plaintiff's complaint, defendant specifically denies the statement therein made that said Act "applies only to out of state dealers and does not apply to local automobile dealers". Defendant states that said Act applies to and requires that all persons, regardless of residence or place of business, who move motor vehicles over the highways of New Mexico in a manner and way similar to that of plaintiff, and as described in plaintiff's complaint, must do so in conformity with the provisions of sub-paragraphs 1 or 3 of paragraph (d) of said House Bill No. 71. That sub-paragraph 2 of said paragraph (d) of said House Bill No. 71 does not confer upon automobile dealers licensed by the state of New Mexico the right to operate and move motor vehicles over the highways of New Mexico as does the plaintiff as described in plaintiff's complaint; that said sub-paragraph 2 only saves to said automobile dealers licensed by New Mexico the rights which they had by virtue of Sections 11-319 and 11-330 of the Code of New Mexico, [fol. 37] of operating motor vehicles for purposes of demonstration and sale only, prior to the enactment of said House Bill No. 71, and does not confer upon them any new or additional rights. Defendant therefore denies that said Act discriminates between out of state and local automobile dealers.

XXVIII

Further answering sub-paragraph (c) of paragraph IX of plaintiff's complaint, defendant states that the Attorney General of the state of New Mexico has construed and ruled in a written opinion that an automobile dealer duly licensed by the state of New Mexico under the provisions of Sections 11-319 and 11-330 of the Code of New Mexico, who desires to move motor vehicles over the highways of New Mexico in a manner and way similar to that described in plaintiff's complaint must comply with the provisions of

sub-paragraphs 1 or 3 of said House Bill No. 71 and obtain the licenses or permits therein required, a copy of which said opinion is hereto attached, marked "Exhibit A" and made a part hereof as though at this point fully set forth.

XXIX

That the use of the public highways for the transportation of motor vehicles on their own wheels for the purpose of selling or offering the same for sale to or by agents, dealers, purchasers or prospective purchasers is an extraordinary or special use which warrants the separate classification and treatment of those engaging in such movement.

XXX

That the business described in plaintiff's complaint and engaged in by plaintiff is primarily a transportation business by means of which plaintiff and others similarly engaged are enabled to purchase cars at places where prevailing markets are low, to move them over the highways in the manner described herein at low cost to places where [fol. 38] markets are high due to original transportation costs and to thus sell such vehicles at a profit in competition with other vehicles of identical kind, model, style, age and make which were not originally moved under their own power over the public highways. That automobiles, pursuant to a custom of the trade of many years standing are sold at nationally advertised prices "freight on board" Detroit, Michigan, or its immediate vicinity, plus railroad freight charges to place of sale and ultimate delivery; that the railroad transportation costs increase with the distance from Detroit and vicinity and that as a result vehicles originally sold at great distances away from Detroit and vicinity are sold new for substantially higher prices than those sold new at points much closer to Detroit and vicinity. That the original sale price of such vehicles has a proportional and direct relationship to the trade-in and resale value of used cars and that the used car market in such respective areas varies in about the same proportion. That principally, by reason of these facts, plaintiff and others similarly situated are able to buy cars in low markets and sell them below the usual price in such higher markets by reason of the inexpensive or low-cost method of moving them to such place of sale. That such vehicles are of the identi-

cal kind and quality of other vehicles available on such higher markets at such higher prices and that the principal ingredient placed in such cars by plaintiff and others engaged in such caravaning is the transportation in the manner herein described. That the caravaning of such cars is the principal portion of the business so engaged in and that the purchase at low markets and sale at higher markets is purely an incident to such business and that such caravaning is chiefly a transportation business and by its nature may be properly and separately classified and regulated as distinguished from ordinary highway use.

[fol. 39] Wherefore, defendant prays that the temporary restraining order be dissolved and the bill of complaint dismissed herein at plaintiff's costs.

Frank H. Patton, Attorney General; Quincy D. Adams, Assistant Attorney General, State of New Mexico, Attorneys for Defendant.

Duly sworn to by Quincy D. Adams. Jurat omitted in printing.

EXHIBIT "A" TO RETURN AND ANSWER

"September 6, 1935.

[fol. 40] Hon. John D. Bingaman, Commissioner of Revenue, Santa Fe, New Mexico

DEAR SIR:

This is in reply to your letter in which you ask our opinion upon the following question:

"What is the correct interpretation of that portion of paragraph (d) of Section 1, Chapter 56, Laws of 1935, purporting to exempt certain automobiles from the usual registration fee or a special permit and which reads that 'no person, firm or corporation shall use the highways * * * for the transportation of any motor vehicle on its own wheels for the purpose of selling, etc. * * * unless such motor vehicle * * *

2. Is owned by an automobile dealer duly licensed by the State of Mexico and is operated under a dealer's license duly issued to such dealer;'?"

The statute referred to by you is what is generally known to be the Auto Caravan Law. It requires that any motor vehicle being transported on its own wheels for the purpose of sale shall be licensed by the State of New Mexico or that a special permit be issued for the use of the highways in such manner, unless such motor vehicle be owned and operated as stated in sub-paragraph 2 above quoted.

Your difficulty seems to be in determining in just what cases the exception applies. At the time of the passage of Chapter 56, Laws of 1935, the only way in which automobile dealers could operate motor vehicles upon the public highways of this state, without their being registered in the usual manner, was by the use of demonstration plates, [fol. 41] provision for which is made in Section 11-319, Paragraph (a) and Section 11-330, 1929 Compilation. Section 11-330 reads as follows:

"11-330. Dealer's demonstration numbers. A dealer in motor vehicles may, in lieu of registering each vehicle he may wish to demonstrate on any highway apply for and secure a dealer's demonstration number, which he may use by attaching registration and number plates issued by the department to each vehicle so used for demonstration only, and not for hire or private use.

The annual registration fee to be paid by such dealer shall be $50.00, which shall entitle him to one pair of plates and he shall be required to pay $10.00 for each pair of extra plates he may use."

It will be noted that such license plates can be used only when the vehicle is being *'used for demonstration only and not for hire or private use.'* Of course it is common knowledge that the demonstration of motor vehicles is usually performed for the purpose of 'selling' or offering the same for sale.'

If paragraph (d) of Section 1 of Chapter 56, Laws of 1935, did not make an exception of such cases it would then be necessary for a dealer who wished to demonstrate a car to a prospective purchaser not only to secure demonstration plates but also to secure the ordinary registration plate or else a special permit at a cost of $7.50.

In my opinion, it was to avoid this double tax and *for no other purpose* that sub-paragraph 2 was placed in the statute. I do not think that it was the intention of the 1935

legislature in enacting Chapter 56 to broaden or extend [fol. 42] the use of demonstration plates so as to permit the caravaning of motor vehicles simply by attaching such plates. If this had been the intention of the legislature it would, in my opinion, have resulted in the violation of Section 18, Article IV, New Mexico Constitution, which provides that

"no law shall be revised or amended or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended, or *extended* shall be set out in full."

It should be presumed that the legislature did not intend to enact an unconstitutional statute and such a construction should be avoided if possible.

In view of the foregoing it is my opinion that the correct interpretation of sub-paragraph 2 above quoted is that persons transporting motor vehicles over the highways of this state on their own wheels 'for the purpose of selling or offering the same for sale, etc.' need not procure the ordinary license plates or a special permit when and only when:

1. Such vehicle is owned by an automobile dealer.

2. Such automobile dealer has paid the registration fee of $50.00 required by Section 11-330, 1929 Compilation.

3. There is attached to such vehicle a dealer's license plate duly issued under the provisions of Section 11-330, 1929 Compilation, and,

4. Such vehicle is being '*used for demonstration only and not for hire or private use*' and not caravaning.

Trusting that the above answers your inquiry, I am
Very truly yours, Quincy D. Adams, Asst. Atty. Gen."

QDA—OR.

[fol. 43] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT—Filed November 30, 1935

This cause came on for final hearing at Albuquerque, New Mexico, on September 13, 1935. A written stipulation of

facts was filed and in addition thereto testimony was submitted. Predicated upon such stipulation and such testimony and in compliance with Equity Rule 70½, we make the following findings of fact:

1. The stipulation is adopted and all the facts recited therein are found to be true to the same extent and for all intents and purposes as though repeated at length herein.

2. The highways of the state, including that over which plaintiff causes his automobiles to be driven, are used regularly by the general public with motor vehicles of all kinds. The manner in which plaintiff causes his automobiles to be transported is extraordinary and unusual; it increases the hazards incurred by the general public in such use and in that manner affects the safety and public welfare; and it increases the burden and expense of policing the highways.

3. The transportation of plaintiff's automobiles, particularly in units of two cars coupled together by the use of tow-bars or other similar devices, causes peculiar wear and tear of the highways and increases the cost of their upkeep and maintenance.

4. In most instances persons driving plaintiff's automobiles across the state are not paid anything either as compensation for their services or as expenses; they drive the automobiles and bear their own expenses merely as a means [fol. 44] of securing transportation to California.

5. Plaintiff realizes a substantial profit from the conduct and operation of his business. The continued collection of the tax involved in this suit will reduce the profit by the sum of the tax, but it will not destroy the business nor compel plaintiff to discontinue it.

Done at Albuquerque, New Mexico, on this the 29th day of November, A. D. 1935.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge. F. E. Kennamer, District Judge.

IN UNITED STATES DISTRICT COURT

Messrs. Herbert K. Greer and Oren Parmenter, Attorneys for plaintiff E. M. Piper.

Messrs. Geo. E. Remley, Ralph P. Pierson and Samuel P. Block, Attorneys for plaintiff Howard Morf.

Messrs. Frank H. Patton, Attorney General; Quincy D. Adams, Assistant Attorney General; and E. R. Wright, Attorneys for the defendant.

Before Bratton, Circuit Judge, Neblett and Kennamer, District Judges

OPINION OF THE COURT—Filed November 30, 1935

Per CURIAM:

These cases were submitted together and may be decided [fol. 45] in like manner as they involve questions common to both. Plaintiff Piper resides in Dallas, Texas, and plaintiff Morf resides in Los Angeles, California. They are engaged separately in the business of purchasing used automobiles in Texas and adjacent states other than New Mexico, causing them to be transported in overland processions or caravans through the states of Texas, New Mexico and Arizona and into California and there selling them at wholesale to dealers in used automobiles. The object of each action is to restrain the defendant as Commissioner of Revenue of the State of New Mexico from enforcing collection of the tax provided in Chapter 56, Laws of New Mexico 1935. Both plaintiffs attack the validity of the statute charging that it is repugnant to the Commerce Clause and the Fourteenth Amendment to the Constitution of the United States, and in addition plaintiff Morf asserts that it was repealed by Chapter 136 of the same legislative session.

The statute, in subdivision "d", forbids use of the highways of the state for the transportation of any motor vehicle on its own wheels for the purpose of sale either within or without the state which is not licensed by the state or owned and operated by a dealer duly licensed and operated under a dealer's license, without securing a special permit as therein authorized. The Commissioner of Revenue is then empowered to issue special permits upon payment of a fee of $7.50 for each single vehicle so transported and a fee of $5.00 for each vehicle towed or drawn by another. The pertinent part of the statute reads:

"No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any [fol. 46] motor vehicle on its own wheels for the purpose of

selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Commissioner of revenue of the State of New Mexico upon application on such form as said Commissioner may prescribe and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. * * *"

Plaintiffs are engaged exclusively in interstate commerce in the transportation of their automobiles, but it is settled [fol. 47] by repeated decisions that a state may lay upon operators of motor vehicles moving exclusively in interstate commerce a reasonable and non-discriminatory tax as compensation for the use of the highways and as a fair contribution to the cost of police regulation of traffic. Hendrick v. Maryland, 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160; Clark v. Poor, 274 U. S. 554; Interstate Busses Corp. v. Blodgett, 276 U. S. 245; Interstate Transit Co. vs. Lindsey, 283 U. S. 183; Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285. That general doctrine is conceded, but plaintiffs say that the statute does not come within its boundaries because the tax imposed is unreasonable, arbitrary and discriminatory and bears no reasonable relation to the use made of the highways.

The automobiles transported by plaintiffs are moved in processions or caravans usually consisting of fourteen, sixteen or eighteen vehicles. Quite frequently they are in units of two coupled together by the use of tow-bars or other similar devices with no elasticity or play between them. The front car in the pair is operated by the driver and it pulls or draws the second one. There is no connection between the respective braking systems of the two. Both are controlled by that of the front car. It is obvious that the movement of automobiles in that manner and with the rear vision of the driver impaired by the second car, provides a substantially less measure of safety than does the operation of a single vehicle; and caravans of this nature present difficulty and other hazards to travelers. It is frequently difficult on overtaking such a caravan to pass it. Much delay, inconvenience and hazard is sometimes encountered. Moreover, there is a mechanic with each cara- [fol. 48] van and sometimes when one car or a unit of two cars has tire or mechanical trouble, all cars are stopped and that likewise causes traffic difficulty and hazard. And many of the persons who drive automobiles for plaintiffs are not employed regularly. They are not paid anything either as compensation for their services or for expenses. They bear their own expenses and drive the cars merely as a means of obtaining transportation to California. It may reasonably be inferred that they have scant interest in the business or the vehicle being driven and a minimum of regard for the safety of others using the highways. But that is not all. Due to the lack of elasticity or play between two vehicles attached by tow-bars or other like devices, the rear car skids, particularly in going around curves, and that causes peculiar wear and tear of the highways. Transportation of automobiles in that manner for sale is a new and distinct commercial business. It bears marked features of dissimilarity from other kinds of transportation. Manifestly the additional traffic hazards and the wear of the highways which it occasions cast a substantially heavier financial burden upon the state for maintenance and for the enforcement of police and safety measures.

It must be assumed that the legislature took all of these elements and perhaps others into consideration in fixing the license upon transportation of that kind; and a wide range of discretion must be accorded to the legislative power in dealing with the classification of businesses in-

cluding commercial transportation, and their subjection or regulation through an excise or license tax. The propriety of legislative action within the scope of police power is not for the determination of the courts. All such questions relate to policy and are remitted to the judgment of the legis- [fol. 49] lature whose decision must stand even though its wisdom is fairly debatable. The exercise of scientific precision in classification and the exaction of licenses or fees for the use of the highways is not essential to validity. Sproles v. Binford, 286 U. S. 374. A court is not free to substitute its judgment for that of the legislature in respect to the choice of expedients or merits between different methods of fixing such fees. Making concrete application of that abstract doctrine, the judgment of the legislature cannot be overthrown unless the license fee in question is manifestly unreasonable, arbitrary, capricious, or without any reasonable relation to the use of the highways. When the differentiating features of transportation of this kind are borne in mind with the increased hazards of traffic, the deleterious effect upon the highways and the heavier financial burden of upkeep and police regulations, we cannot say that the statute is open to the attack directed against it.

Next it is urged that the application of the statute to Plaintiffs constitutes a discrimination against interstate commerce. The argument is divided into several parts. Stress is laid upon the fact that plaintiffs use and traverse only about 165 miles of highway in crossing the state and are required to pay the tax for each car making the single trip; that the tax is disproportionately high when compared to that exacted of others and that a resident dealer may caravan automobiles into the state with his dealer's license plates attached and without payment of the tax provided in the statute under consideration. The fact that it is only 165 miles from the point at which vehicles transported by plaintiffs enter the state to the point at which they depart from it is not determinative. The license confers the right of transportation into or through the state [fol. 50] without regard to distance. Plaintiffs have the privilege of transporting their automobiles by a longer route without additional charge. Certainly the exaction of a flat charge for such transportation, instead of graduating it upon a mileage basis which conceivably could entail substantial administrative difficulty and expense, cannot be

said to constitute discrimination. Instead it comes well within the range of legislative discretion over which a court has no supervisory control. Neither can it be regarded as objectionable discrimination when contrasted with the graduated fees required of those who operate trucks and busses. The clear and distinctive differences between the characteristics of transporting vehicles in caravans with that of operating single trucks or busses are matters for the legislature to determine in fixing license fees and its determination of them cannot be disturbed unless the asserted discrimination is plain. The difference in kind or amount of the license fees here is not enough to call discrimination. The contention that there is discrimination in the fact that a resident dealer may caravan automobiles into the state with his dealer's plates attached and without payment of the tax provided in the statute under consideration rests upon an unfounded premise. A resident dealer may obtain a dealer's demonstration number. The annual fee of $50.00 entitles him to one pair of plates and he may secure additional plates upon payment of $10.00 for each paid. Sec. 11-330 Comp. 1929. But such plates may be used only for automobiles used exclusively for demonstration purposes. They may not be attached to automobiles which are caravaned into the state for other purposes. To illustrate, if a dealer should desire to caravan twenty automobiles into the state, only two of which are to be used for demonstration purposes, his dealers' plates may be attached to the two, but he would be required to pay the tax on the eighteen and secure a special permit in ac-
[fol. 51] cordance with the statute.

We come now to the contention that Chapter 56, supra, was repealed by Chapter 136 of the same session. The former was approved on February 21st; the latter on February 28th and it contains no provision expressly repealing the former act. It is unnecessary to suggest that repeal by implication is not favored and that both statutes should be construed together and in harmony with each other if that can be done without violating the plain language used or the manifest legislative intent. Chapter 56 is essentially substantive in character. It forbids the use of the highways for the transportation of automobiles for sale without payment of the fee and the securing of the special permit authorized therein. That is the major purpose of

the act. On the other hand the object of Chapter 136 is to facilitate greater efficiency in unified administration of the laws respecting the highways, including police regulations and taxes. That legislative objective is stated at length in the first section. After creating a Port of Entry Board composed of the State Highway Engineer, a member of the State Corporation Commission and the Commissioner of Revenue, authorizing the establishment of ports of entry into the state and elaborate procedure for the examination, registration and issuance of permits to motor vehicles for the transportation of passengers for hire or for the transportation of property which enter the state, a mileage tax from the point of entry to the point of destination, graduated on the basis of weight of vehicle and cargo, is levied. It is then textually provided that the tax shall not apply if the owner or operator elects to register the vehicle with the Bureau of Revenue and pay the fees required for the issuance of license plates. At the time that law was enacted there were two existent statutes with [fol. 52] respect to fees on automobiles. One provided for registration, payment of license fees and the issuance of license plates. It was clearly provided that both such fees and the mileage tax should not be exacted; that payment of such registration fees should render the owner or operator immune from payment of the mileage tax. The other was the statute in question which requires payment of the so-called caravan fee. No such provision is found against payment of that fee and the mileage tax at the same time. The care with which the legislature interdicted exaction of both in one instance and failed to do so in the other is significant. It indicates persuasively an intent in the latter instance to require both; in other words that the mileage tax shall supplement the flat fee. Thus there is no conflict between the two statutes. On the contrary, they are in harmony and operate together with respect to transportation of the kind involved here. And there is no obstacle to the imposition of different licenses and taxes by successive acts if together they are reasonable and non-discriminatory. Interstate Busses Corp. v. Blodgett, supra.

These are our conclusions of law. For the reasons indicated the bills will be dismissed for lack of equity.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge.

IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed November 30, 1935

KENNAMER, District Judge, dissenting:

There can be no doubt that a state may lawfully exact of [fol. 53] interstate traffic a tax which bears a fair relation to the expense occasioned to such state by the presence of such traffic upon its highways.

There is also no doubt that the legislature of a state may make any reasonable classification of interstate traffic, for tax purposes, so long as the classification is defined by characteristics which bear some relation to the expense or hazard occasioned by the class.

Interstate traffic in motor vehicles may be the subject of such a classification. The constitutional limitation imposed upon the power of the legislature to levy taxes upon any such class is, that it must be in a sum which is a fair contribution to the cost of constructing and maintaining the highways, and of regulating traffic thereon.

In my opinion the statute in question, being subdivision d, of chapter 56, laws of New Mexico, 1935, does not accomplish a proper classification. An analysis of the statute discloses that the classification is defined by two limitations. The first is expressed in the following excerpt from the statute: "Any motor vehicle on its own wheels." The second dimension of the classification is as follows: "For the purpose of selling or offering the same for sale." Two characteristics, and only two, are necessary to render the vehicle subject to the tax. It must be moving on its own wheels and must be transported for the purpose of sale. Of the two restrictions upon the class the latter is the dominant.

Reduced to its substance the classification attempted is of vehicles being transported "for the purpose of sale" not of vehicles moving in integrated fleets which may, and doubtless do, occasion extra traffic hazards requiring unusual and expensive policing of the highways. The tax is levied alike upon vehicles moving in fleets and upon vehicles moving singly, so long as the same are goods seeking [fol. 54] their market; notwithstanding the evident fact that the single "purpose of sale" vehicle cannot conceiv-

ably cause the state a greater expense by wear to the highways and policing than the same vehicle will occasion in traversing the state in pursuit of other commercial enterprises not subject to the tax.

Some point is made of the fact that two vehicles moving in tandom, under the power of one only, cause greater damage to the roads than two vehicles moving separately, each under its own power. Further point is made of the increase in traffic hazard by reason of the transportation of vehicles in tandom, which is occasioned by the lack of integrated brake control. An examination of the taxing statute discloses the tandom practice of transportation to be encouraged rather than penalized in proportion to the increase in expense and hazard. Single vehicles, whether moving in fleets *are* not, are charged the flat rate of $7.50 per car. Vehicles in tandom (which the state contends to to be more dangerous and more damaging) are offered a discount of $2.50 upon the gross tax levied against the t-o automobiles. It is plain that the average charge per car decreases as the traffic hazard is emphasized by the transportation of vehicles in tandom. The statute actually offers a premium for the complication of the state's traffic problem.

I am strongly of the opinion that a proper tax classification of vehicles moving in integrated fleets for any purpose would be proper. The statutes in question do not accomplish such classification. Doubtless the State of New Mexico has power to regular- the number, the speed, and generally control the deliberate concentrations of traffic, whether in interstate commerce or not. The state may even require caravans to proceed under convoy, so long as the regulation reasonably relates to public safety or convenience. It follows that the state may exact of such traffic a [fol. 55] charge in excess of the charge upon other traffic to defray the expense of the additional service required of the state because of its class character. But when levied against interstate commerce the excess must be shown fairly to approximate a recoupment of an excess of expense occasioned to the state by reason of the peculiarities which form the basis of its classification.

I am of the opinion that the statute involved is invalid, in so far as the same relates to interstate commerce, and that the enforcement thereof should be enjoined.

In United States District Court

Decree Dissolving Temporary Injunction, Assessing Damages and Dismissing Bill of Complaint—Filed December 24, 1935

This cause having heretofore come on for final hearing on the bill of complaint herein praying for a decree enjoining and restraining the defendant, as Commissioner of Revenue of the State of New Mexico, from enforcing the provisions of Chapter 56 of the Session Laws of 1935 of the State of New Mexico, and the Judge of the above Court having called to his assistance to hear and determine this cause, the Hon. Sam G. Bratton, Judge of the Circuit Court of Appeals for the Tenth Circuit, and the Hon. Franklin E. Kennamer, Judge of the District Court of the United States for the Northern District of Oklahoma, pursuant to the provisions of Sec. 266 of the Judicial Code, and the said cause and the evidence therein having been heard before said three-Judges, and the cause having been argued by counsel thereupon, upon consideration thereof,

It is ordered, adjudged and decreed as follows:

[fol. 56] 1

That the temporary restraining order heretofore issued in this cause be and the same is hereby dissolved.

2

That the defendant's damages upon the bonds heretofore given in this cause, in accordance with the provisions of the temporary restraining order, be and they are hereby assessed at $4,825.00, as of the 18th day of December, 1935, and judgment for said damages in the amount aforesaid is hereby entered against the plaintiff and the United States Fidelity & Guaranty Company, a corporation, the surety of the plaintiff upon said bonds, with interest thereon at the rate of six (6) per cent per annum from the 18th day of December, 1935 until paid, and for the costs of this action to be taxed.

3

That the bill of complaint herein be and the same is hereby dismissed at plaintiff's costs.

For all of which let execution issue.

To all of which rulings the plaintiff excepts.

Dated at Santa Fe, New Mexico, this 24th day of December, A. D. 1935.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge. F. E. Kennamer, District Judge.

OK. E. R. Wright.

OK. R. K. Pierson. Geo. E. Remley. J. R. Modrall, Asst. Atty. General.

[fol. 57] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 2789. Equity

HOWARD MORF, Doing Business Under the Firm Name and Style of Pacific Wholesale Automobile Company, Plaintiff,

vs.

JOHN D. BINGAMAN, Commissioner of Revenue for the State of New Mexico, Defendant

Bill of Exceptions—Filed February 10, 1936

APPEARANCES

Mr. George E. Remley, Santa Fe, New Mexico; Mr. Ralph K. Pierson, Compton, California; Mr. Samuel P. Block, Compton, California, Attorneys for Plaintiff, Howard Morf.

Mr. Frank H. Patton, Attorney General, Santa Fe, New Mexico; Mr. Quincy D. Adams, Assistant Attorney General, Santa Fe, New Mexico; Mr. E. R. Wright, Santa Fe, New Mexico, Attorneys for Defendant.

The following named Judges composed the statutory Three Judge Court, before which the above entitled cause was tried, to-wit:

Hon. Sam G. Bratton, Judge of the United States Circuit Court of Appeals for the Tenth Circuit,

Hon. F. E. Kennamer, Judge of the United States District Court for the Northern District of Oklahoma,

Hon. Colin Neblett, Judge of the United States District Court for the District of New Mexico.

[fol. 58] AGREEMENTS AS TO HEARING AND SUBMISSION

The court convened in Albuquerque, New Mexico at 2:00 P. M. on the 13th day of September, 1935. It was agreed in open court that Cause No. 2778 Equity and Cause No. 2789 Equity should be submitted together.

The plaintiff Howard Morf, doing business under the firm name and style Pacific Wholesale Automobile Company, in open court, proffered and was permitted to file in Cause No. 2789 Equity his amendment to his complaint, which said amendment was other, different from, and in addition to the amendment theretofore permitted to be made by interlineation, as shown in the record proper. Thereupon the defendant, having had no opportunity to file formal pleading to such amendment, it was in open court agreed that the hearing should proceed and stand as though issue had been joined upon the Bill of Complaint as so amended.

Thereupon the parties presented to the court written stipulation concerning certain facts, which said stipulation provided in substance that nothing therein contained should preclude either party from objecting to the admission in evidence of any facts so stipulated on the grounds of irrelevancy or immateriality.

It was agreed in open court that the filing of said stipulated facts should not preclude either party from calling witnesses to the stand and adducing other and further evidence and testimony from said witnesses.

It was thereupon agreed and stipulated in open court that the hearing upon the issues then joined, and upon the facts stipulated and to be adduced, should be final.

Thereupon the written stipulation of facts entered into between the plaintiff and the defendant was read to the court, which said stipulation is as follows

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[fol. 59] STIPULATION OF FACTS

It is hereby stipulated between the attorneys for Plaintiff and the Attorney General, of the State of New Mexico, representing the defendant, that for the purpose of hearing and trial of the above entitled cause, Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, Plaintiff, vs. John D. Bingaman,

Commissioner of Revenue for the State of New Mexico, Defendant, the following may be taken and considered by the Court as true:

I. That the plaintiff, Howard Morf, is a resident and citizen of the City and County of Los Angeles, State of California, and engaged in business under the name and style of Pacific Wholesale Automobile Company in said city, county and state aforesaid; that the defendant, John D. Bingaman, is the duly appointed and qualified Commissioner of Revenue for the State of New Mexico, and is a citizen and resident of the State of New Mexico.

II. That the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

III. That if the plaintiff should pay the demands made upon him for the payment of the registration fee provided for in Chapter 56 of the Session Laws of New Mexico, for the year 1935, he has no remedy at law for the recovery of the money so paid should it be determined that the application of Chapter 56, of the Session Laws of 1935, to the plaintiff is unconstitutional.

That there is no provision of law in New Mexico which permits the plaintiff to pay the fees required under said Chapter under protest and to recover the same by an action at law.

That Chapter 56 of the Session Laws of New Mexico, for the year 1935, is also property designated as House Bill No. 71.

IV. That if injunctive relief is not granted to the plaintiff restraining the enforcement of the provisions of Chapter 56, of the Session Laws of 1935, the defendant will proceed to the enforcement of the provisions of this statute as against the plaintiff and the effect of the enforcement of such provisions will be to prohibit plaintiffs operations [fol. 60] through the State of New Mexico, only and until the plaintiff complies with the provisions of said statute and pays the fees required thereby.

V. That due and timely notice of the filing and pendency of this cause was given to the Governor of the State of New Mexico.

VI. That the plaintiff is engaged in the business of purchasing new and used automobiles in various eastern and

southern states of the United States and driving, or causing the same to be driven on their own wheels over the public highways of the states where the said used automobiles are purchased and through the states of New Mexico, Arizona and California, and into the state of California, for the purpose of selling the same.

VII. That plaintiff does not sell, or offer for sale any of said cars within the State of New Mexico, and does not maintain any place of business therefor within the State of New Mexico.

VIII. That the used cars so handled by the plaintiff are acquired by the plaintiff in either the State of Texas or in some other state, other than the State of New Mexico, in the southern and southeastern part of the United States, and when transported over the highways of New Mexico, belong to and are the property of the plaintiff, and properly registered and licensed in other States, but are not registered or licensed in New Mexico.

IX. That the plaintiff, in transporting used motor vehicles through the State of New Mexico, and over the highways of the State of New Mexico, enters the State of New Mexico at Anthony, New Mexico, traveling over Highway No. 80 to Las Cruces, New Mexico, thence over Highway No. 80, through Lordsburg, New Mexico, and leaving New Mexico at Steins, a distance of one hundred and sixty-six miles, and said trip takes approximately seven hours.

X. That in transporting said used cars over the highways of the State of New Mexico, and through the State of New Mexico, said vehicles are customarily and ordinarily moved in processions or caravans, two cars being coupled together by the use of tow bars, or similar attachments, so that said cars are operated in tandem or in pairs, one car being operated by the driver and pulling another. That there is no connection between the braking system [fol. 61] on the lead car with the braking system on the car being towed.

XI. That that portion of U. S. Highway No. 80 between Anthony and Steins, New Mexico, carries traffic of such volume as is ordinarily found in sections that are sparsely populated; that said highway between Anthony, New Mexico, and Las Cruces, New Mexico, is a concrete, two-lane

roadway sixteen feet in width, plus three feet shoulders on each side.

XII. That the caravan fees collected by the State of New Mexico, from March 1st, 1935, to September 4, 1935, is approximately $40,000.00.

XIII. That from March 1, 1935, to June 30, 1935, fees under Chapter 56 of the Session Laws of 1935 were collected in the amount of approximately $33,500.00 and that during such period, fees were collected without the aid of the ports of entry.

XIV. That the total collections made by the ports of entry, from July 1st to September 4th, 1935, under the provisions of Chapter 136, Session Laws of 1935, amount to Thirteen Thousand Three Hundred Sixteen and 22/100 Dollars ($13,316.22) and during this period such fees were collected by the ports of entry.

XV. That the total expense of operating the ports of entry by the state of New Mexico, under the provisions of Chapter 136, Session Laws of 1935, from July 1st to August 31st, 1935, is Seven Thousand Fifty-two and 68/100 Dollars ($7052.68), but that said ports of entry are engaged in numerous duties other than enforcement of said law, and collecting fees thereunder.

XVI. That substantially all of the fees under Chapter 56 of the Session Laws of 1935 have been collected through the ports of entry since July 1st, 1935, which is the effective date of the establishment of the ports of entry, and that such ports of entry are the principal instrumentality relied upon by the State of New Mexico for the collection of such fees, subsequent to July 1, 1935, that collections were made under said law prior to that time without the establishment of ports of entry.

[fol. 62] XVII. That plaintiff has been engaged in the automobile business for more than three years and has made a livelihood thereby; that said business is worth more than $15,000.00.

XVIII. That plaintiff is engaged strictly in interstate commerce.

XIX. That it is necessary to plaintiff's business for him to transport his automobiles over Highway No. 80 in the

State of New Mexico, for a total distance of approximately 166 miles and that his fees under the provisions of said Chapter 56 amount to $7.50 per car if run separately, and if run in pairs, $12.50 per pair.

XX. That plaintiff is not engaged in the business of Common Carrier.

XXI. That the used car market in the State of Texas, and in states immediately adjacent and east of the State of Texas, is generally lower than the used car market in the State of California and upon the west coast of the United States, and that by reason thereof the value of the used cars handled by the plaintiff is generally lower in the areas in which plaintiff acquires said used cars than the value and market for such used car of identical make, model, quality and condition in the State of California, and generally, on the west coast of the United States.

XXII. That the distance from the points of purchase, over the public highways of the states of New Mexico, Arizona and California, to Los Angeles, in the state of California, where the re-sale of the plaintiff's said vehicles occurs, exceeds one thousand miles.

XXIII. That the motive power and the brakes on the lead car were originally designed to propel or restrain only one vehicle; that the customary operation of the plaintiff places the heavier car as the towing car, and that all cars are inspected and the brakes, motor and lights are inspected and adjusted before leaving Dallas.

XXIV. That customarily the towing car does not have any rear view mirror on the driver's side of the car outside of the car.

[fol. 63] XXV. That the freight rate for transporting said used cars from Dallas, Texas, to Los Angeles, California, by rail is $4.55 per hundred-weight, and that the aggregate cost to transport said motor vehicles from Dallas, Texas, to Los Angeles, California, by rail exceeds $100 to $120 for the average automobile so transported, and that the rate for the transportation of automobiles by railroad from the most practicable point immediately east or south of the state border line of the State of New Mexico, to the most practicable point immediately west of the border line

of the State of New Mexico, is $1.00 per hundred-weight; that the cost of transporting used cars through New Mexico over the highways of New Mexico, in the manner employed by the plaintiff, will not exceed the sum of $7.00 per car, exclusive of the license fees complained of herein; that the aggregate cost of such movement from Dallas, Texas, to Los Angeles, California, does not exceed an average of $50.00 per car, exclusive of the license fees.

XXVI. That the caravan fees collected by the State of New Mexico, through its port of entry, from July 1st to August 31st, 1935, amount to Three Thousand Five Hundred Sixty-five Dollars ($3565.00).

XXVII. That the plaintiff has caravaned used cars through the State of New Mexico from August 23, 1935, to September 11, 1935, upon which there is due to the State of New Mexico, if the statute herein is sustained, fees to the approximate amount of $168.75. That plaintiff has paid to the State of New Mexico for cars driven over Highway #80 in the State of New Mexico, between March 6, 1935 and August 23, 1935, the sum of $4,418.75.

That the fee of $7.50 defendant compels plaintiff to pay on each car when driven alone, or leading another car, is equal to a charge slightly in excess of 4¢ per mile; that the fee of $5.00 defendant compels plaintiff to pay on each car when being towed amounts to approximately 3¢ per mile. These figures are based upon the distance of 166 miles from Anthony, New Mexico, to Steins, New Mexico.

[fol. 64] XXVIII. That the total collections made by the ports of entry, from July 1st to September 4th, 1935, under the provisions of Chapter 136, Session Laws of 1935, amount to Thirteen Thousand Three Hundred Sixteen and 22/100 Dollars ($13,316.22).

XXIX. That the total expense of operating the ports of entry by the State of New Mexico, under the provisions of Chapter 136, Session Laws of 1935, from July 1st to August 31st, 1935, is Seven Thousand Fifty-two and 68/100 Dollars ($7,052.68).

XXX. That the State of New Mexico has an area of approximately two hundred thousand square miles, with a population of less than five hundred thousand; that the assessed valuation of property subject to ad varolem taxes

in the State of New Mexico is less than Two Hundred Eighty-five Million Dollars ($285,000,000.00).

XXXI. That the annual appropriation for maintaining the New Mexico State Police is One Hundred and Five Thousand Dollars ($105,000.00), provided that the appropriations made for the maintenance of the State Police shall be paid out of revenues made available to the Commissioner of Revenue for the performance of his duties and allocated to this Department (New Mexico State Police) by the State Board of Finance, and that expenditures shall be made upon detailed budget estimates prepared annually subject to the approval of said Board. That said State Police are engaged in many other duties and perform many other services for the State of New Mexico.

XXXII. That the highways of the State of New Mexico have been acquired by and built, and are maintained by the State of New Mexico at the expense of the State of New Mexico, with the addition of certain contributions in the form of Federal Aid, and that the aggregate cost of such highway system is in excess of Eighty-five Million Dollars ($85,000,000.00) to the end of the fiscal year 1934, and that of said $85,000,000.00, Thirty Million Dollars ($30,000,000.00) have been contributed by the Federal government, leaving a net amount furnished by the State of New Mexico of fifty-five Million Seven Hundred Twenty-three Thousand Dollars ($55,723,000.00); that the aggregate cost of maintaining such highways averaged over a period of ten (10) years is One Million One Hundred [fol. 65] Twenty-five Thousand Dollars ($1,125,000.00) per year; that the budgeted maintenance for the current fiscal year beginning July 1, 1935, is One Million One Hundred Twenty-five Thousand Dollars ($1,125,000.00).

XXXIII. That the highway from Anthony, New Mexico, to Las Cruces, New Mexico, is of concrete construction; that the highway from Las Cruces through Deming, Lordsburg and Steins is oiled surfaced highway; that from Steins to the State line some three (3) miles is gravel; that the cost of constructing this highway from Anthony to Rodeo, being a point which is some thirty-two (32) miles beyond and south of Steins, is $2,536,283.41, of which amount the Federal Government contributed $1,324,878.07, and the cost paid by the State was $1,211,405.34; that the con[illegible]te por-

tion of said road was constructed about 1922; that the oiled road from Las Cruces to Deming was constructed about 1929; that the balance of said road has been constructed within the last two (2) years; that the maintenance of said highway for the fiscal year ending June 30, 1935, was $26,500.00 for a mileage of One Hundred Ninety-three (193) miles.

XXXIV. That for the fiscal year ending June 30, 1934, the revenues received by the Highway Department included Three Hundred Thirty-five Thousand Dollars ($335,000.00) motor vehicle taxes, Two and One-half Million Dollars ($2,500,000.00) gasoline taxes, Sixty-eight Thousand Dollars ($68,000.00) property taxes, One and One-half Million Dollars ($1,500,000.00) gasoline debentures, Five and One-half Million Dollars ($5,500,000.00) Federal Aid funds.

XXXV. That the State Highway Commission has jurisdiction over State Highways only, and these expenditures and costs mentioned in the preceding paragraph relate only to the State Highway system as distinguished from the county roads which are maintained by the counties through an ad valorem tax on property.

XXXVI. That the Attorney General's opinion attached to the Answer as Exhibit "A" was rendered by the Attorney General to the Commissioner of Revenue on September 6, 1935.

[fol. 66] XXXVII. That in addition to the foregoing facts, and in the consideration and determination of the questions of law involved herein, the Court may consider any and all other facts of which it may properly take judicial knowledge, and nothing herein contained shall prevent any party hereto from submitting other or additional pertinent or material facts not contradictory to the facts herein stipulated.

XXXVIII. That by nothing herein contained does any party hereto agree that all of the facts herein stipulated are relevant or material, and the right to object to any facts so stipulated on the ground of irrelevancy or immateriality is hereby reserved.

XXXIX. That upon the facts as herein stipulated, or otherwise established by evidence, the Court shall render

such judgment and grant such relief as shall be just and proper under the Constitution and the laws of the United States and the Constitution and the laws of the State of New Mexico.

PLAINTIFF'S OBJECTIONS AND EXCEPTIONS TO ADMISSION OF CERTAIN FACTS

Whereupon the plaintiff Morf objected and excepted to the admission of the facts set out in paragraphs of said stipulation numbered XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIV and XXXVII, for the stated reasons that they are wholly immaterial in that they can have no bearing or effect upon:

(1) The question of the constitutionality of the Caravan statute (Chapter 56 of the New Mexico Session Laws of 1935) attacked under the issues presented herein;

(2) The question of the repeal of said statute;

(3) The question of the construction, operation, or effect of said statute;

(4) The question of the validity of the acts of the defendant under the apparent authority of said statute, which acts are herein complained of.

[fol. 67] Whereupon the plaintiff MORF, being first duly sworn, testified as follows:

My name is Howard Morf. I am engaged in the automobile business in the City of Los Angeles, California. In my business I purchase second hand passenger automobiles, no trucks, in other states, and drive them into California for sale. In so doing I enter the State of New Mexico at Anthony and leave it at Steins over Highway No. 80. Approximately 80% of the cars I purchase are models of the years 1934 and 1935. Possibly 5% are models of years earlier than 1932. All cars have rubber tires thereon. I transport neither property nor persons in these automobiles for hire, and the only purpose in driving through New Mexico is for sale in California. No automobile so transported exceeds five thousand pounds in weight. During the three years of my operations I have had no accident nor

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have any of my drivers been arrested in New Mexico or any other state. I do not advertise in any way for drivers for my cars.

My methods of transportation through New Mexico are as follows: Every caravan has two or three of my regular employees who are paid a monthly salary or are paid a percentage of the profit. In every caravan there are three or four of my people who make it a business of driving caravan automobiles and hire out to me for that purpose. Sometimes business houses in Los Angeles recommend to me a person who happens to be in the east and desires to return to California by driving a car for me but this number is comparatively small.

Then, in response to questions propounded the witness by Judges Kennamer and Bratton, the witness continued: I am very positive my drivers do not pick up passengers along the road or charge them. My drivers are paid by the buyer or head man in charge of the caravan. To some he pays one dollar a day and expenses and to some two dollars. I pay some five or six colored boys from ten, twelve to fifteen dollars per month. There are some drivers, but not a great many, who receive a very small remun- [fol. 68] eration and their expenses and transportation. In order to get them back to Dallas from California, I send six or seven of them back in a seven passenger car. I pay them nothing at all for that trip except possibly expenses.

The judges having concluded, in response to questions by counsel, the witness continued: I buy cars from wholesale dealers mostly, in Arkansas and Texas or through men who are out buying cars for me on commission. I never hook more than two cars together. When this is done there are in most instances two drivers. Approximately twenty to twenty-five per cent of my cars are driven through New Mexico singly; that is, not hooked to any other car. All automobiles taken through New Mexico by me bear the registration plate of the state in which they were purchased, but none bear New Mexico license plates.

On cross-examination:

In my operations through New Mexico I carry no passengers or property for hire. In driving through New Mexico I do tie two cars together, but I have a greater number of single cars passing through the state than does Mr. Piper.

FIDEL GONZALES, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

My name is Fidel Gonzales and I am a member of the State Police, presently located at Las Cruces, New Mexico, where I have been for about fourteen months. I do not know Mr. Morf, but I am familiar with the type of operation of cars through New Mexico known as the auto caravan. I would say this type of operation increases our duties in regulating motor traffic. Possibly twenty-five per cent of our time is consumed in handling and regulating this type of traffic. Traffic accidents have increased since the caravaning of automobiles began. They drive too close to-
[fol. 69] gether. It makes it difficult for others to pass and they don't keep their lights up in shape. We have warned the drivers at times but have never arrested any of them. I have never seen any side mirrors used on the cars. When the two cars are tied together I have noticed when they go around a curve the back car skids. This also applies to Morf's cars. Sometimes the whole caravan stops when car trouble develops. We have inspected these caravans for stolen cars and always try to get their registration, check the lights, motor number and serial number. The drivers are sometimes women, men and sometimes boys. The caravans sometimes stop in New Mexico over night, and sometimes two or three of the drivers stop at a tourist camp while the rest of them sleep in the cars.

On cross-examination:

I would not say that accidents on the whole have increased this year than over the same period last year. Sometimes when we stop the drivers they say they are tickled to death to get some sleep. They did not sleep the day before. I do not know whether accidents all over the state have increased and have been increasing each year.

The front wheels of the towed car are free. I have seen some of Mr. Morf's hook-ups skid around a curve and have warned some of his men.

As a State Police officer it would be my duty to arrest reckless drivers, but I have made no arrests of drivers of Mr. Morf's caravans, nor have I arrested them for failure to have legal lights, but I have made them fix these lights at times. Notwithstanding these automobiles bear a placard issued by the Port of Entry officials, I have stopped

them and checked the same automobiles already checked at the Port of Entry. In all of the caravans going through the state, I believe I have arrested two drivers only.

[fol. 70] Redirect examination:

The speed of the caravans varies according to the drivers. Some will drive around forty-five and fifty miles per hour perhaps.

Recross-examination:

There are no speed laws in New Mexico. I have not felt called upon to make arrests for reckless driving.

ORDER AS TO BRIEFS

Whereupon the court granted to the plaintiffs five days within which to prepare briefs, the defendants five days thereafter, and the plaintiffs five days thereafter in which to file reply briefs. It was agreed in open court that the order of court might be signed without the court reassembling.

Whereupon the court closed the hearing and adjourned.

Thereafter and on to-wit the 18th day of December, 1935, the court having filed herein its opinion and findings of fact, the plaintiff Morf filed herein his objections and exceptions to the court's findings of fact, in the following words, to-wit:

[fol. 71] OBJECTIONS AND EXCEPTIONS TO THE COURT'S FINDINGS OF FACT

The court having made its findings of fact herein, now comes the plaintiff, before the entry of judgment in the above entitled cause, and objects and excepts to the court's findings of fact, and as grounds for such objections assigns the following reasons, to-wit:

I

The plaintiff objects and excepts to the court's findings of fact number I wherein it adopts as true all of the facts recited in the stipulation concerning said facts heretofore filed for the following reasons:

(a) That it is provided in said stipulation "that by nothing herein contained does any party hereto agree that all of the facts herein stipulated are relevant or material, and that the right to object to any facts so stipulated on the ground of irrelevancy or immateriality is hereby reserved."

(b) For each and every of the reasons stated in plaintiff's objection to the admission in evidence of the facts stipulated, which objection was filed with the Clerk of said court on the 17th day of September, 1935:

II

Plaintiff objects and excepts to the following portion of the court's finding Number II, to-wit:

[fol. 72] "The manner in which plaintiff causes his automobiles to be transported is extraordinary and unusual; it increases the hazards incurred by the general public in such use, and in that manner affects the safety and public welfare; and it increases the burden and expense of policing the highways."

for the reason:

(a) That such portion of said finding is contrary to and is not supported by the evidence adduced at the trial of this cause.

(b) That the statute under which the defendant is extorting fees and payment from the plaintiff, to-wit, Chapter 56 of the 1935 Session Laws of the State of New Mexico, does not purport to be and is not in fact a police measure to regulate the use of the highways of the State of New Mexico or to promote the public safety and welfare, and said finding is therefore immaterial.

III

Plaintiff objects and excepts to the court's finding of fact numbered III on the following grounds and reasons, to-wit:

(a) That said finding is not supported by the evidence adduced at the trial of this cause.

(b) That said finding ignores the fact that a large percentage of plaintiff's automobiles are transported over the

public highways of the State of New Mexico singly, and without any car being towed thereby.

IV

Plaintiff objects and excepts to the court's finding of fact Number IV upon the following grounds and for the following reasons:

(a) That such finding is contrary to and is not supported by evidence adduced in the trial of this cause.

(b) That such finding is wholly immaterial under the issues in this cause joined.

[fol. 73] V

Plaintiff objects and excepts to the court's finding of fact Number V upon the reason that the same is not supported by any evidence adduced in the trial of this cause.

[fol. 74] In United States District Court

[Title omitted]

Stipulation re Settlement of Bill of Exceptions

It is hereby stipulated by and between said plaintiff and said defendant, each acting through his respective attorneys of record herein, that the above and foregoing seventeen pages constitute a true statement of such of the evidence adduced in the trial of the above entitled cause and of such of the proceedings had in said cause, other than the record proper, as is sufficient and essential to the decision of the questions presented by the appeal to the Supreme Court of the United States from the judgment entered in this cause; and it is further stipulated that the foregoing statement with this stipulation attached may be settled, signed and sealed by the three judges presiding at the trial of this cause, as and for said plaintiff's bill of exceptions, without further notice to said defendant or his attorneys, without the necessity of said court being reconvened and at any time and place said judges may elect.

Dated this 1st day of February, 1936.

Geo. E. Remley, Attorney for Plaintiff, Santa Fe, New Mexico. Quincy D. Adams, Assistant Attorney General of the State of New Mexico, and Attorney for said Defendant.

[fol. 75] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The plaintiff and defendant acting through their respective attorneys of record herein, having filed with the clerk of this court in this cause their written stipulation that the above and foregoing statement in narrative form with said stipulation attached may be settled, signed and sealed by the three judges presiding at the trial of said cause, as and for said plaintiff's bill of exceptions,

Now, therefore, we, the judges before whom said cause was tried, and within the time permitted by rule of court, do hereby allow, settle, sign and seal the attached and foregoing, consisting of eighteen pages of typewritten matter, as and for said plaintiff's bill of exceptions in his appeal from the judgment herein entered to the Supreme Court of the United States, and do hereby order that the same be filed as and for a part of the record in this cause on said appeal.

Dated this 5th day of February, 1936.

Sam G. Bratton, Judge of the United States Circuit Court of Appeals, Tenth Circuit. F. E. Kennamer, United States District Court Judge for the Northern District of Oklahoma. Colin Neblett, United States District Court Judge for the District of New Mexico.

[fol. 76] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed December 24, 1935

Comes now Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, plaintiff in the above entitled cause, by and through his attorneys, Ralph K. Pierson and Samuel P. Block, of Compton, California, and George E. Remley of Santa Fe, New Mexico, and feeling himself aggrieved by the decree entered in said cause on the 24th day of Dec. 1935, dissolving the temporary restraining order theretofore issued in this cause, assessing defendant's damages by him sustained by reason of said restraining order, and dismissing plaintiff's

bill of complaint at plaintiff's costs, hereby prays that he be allowed an appeal from said decree to the Supreme Court of the United States, and in connection with his said petition said plaintiff herewith presents his assignment of errors and statement of jurisdiction.

Dated this 24th day of December, 1935.

Ralph K. Pierson, Compton, California.. Samuel P. Block, Compton, California. Geo. E. Remley, Santa Fe, New Mexico.

The appeal above prayed for is hereby allowed this 24th day of December, 1935.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge. F. E. Kennamer, District Judge.

[fol. 77] In United States District Court

Order Allowing Appeal and Granting Supersedeas—Filed December 24, 1935

The petition of Howard Morf, plaintiff in the above entitled cause for an appeal from the final decree dated December 24th, 1935, is hereby granted and the appeal is allowed; and upon petitioner filing a bond in the sum of $7500.00 with sufficient sureties, conditioned for the payment to the defendant of the damages assessed in said decree and the costs of this proceeding, in the event of the affirmance of the same, and further conditioned for the payment to the defendant of any additional damages which may accrue to the defendant pending the final determination of said appeal, the same shall operate as a supersedeas of the decree herein, and shall maintain the status quo of the parties hereto as the same existed prior to the entry of the decree herein, pending the final determination of said appeal; and

It is further ordered, that upon the filing of the bond hereinbefore provided for, and upon the approval of the same by the Clerk of the United States District Court for the District of New Mexico, the bonds heretobefore given by the plaintiff under the terms and provisions of the temporary restraining order issued in this cause shall be exonerated; and

It is further ordered, that upon showing made by the defendant that additional damages have accrued to the defendant during the pendency of said appeal which, together with the amount of damages assessed in said decree, have exhausted the penalty of said appeal bond herein provided for, then and in such event the plaintiff shall be required to give further and additional bond and to file the [fol. 78] same with the Clerk of the United States District Court for the District of New Mexico, conditioned as herein provided, and upon failure of the plaintiff to file such further and additional bond, conditioned as hereinbefore provided, within five (5) days after notice and demand made therefor, the provisions of this order preserving the status quo pending appeal shall be terminated and the defendant entitled to proceed with the enforcement of the provisions of Chapter 56 of the Session Laws of 1935 of the State of New Mexico from said date, to the same effect as though the provisions of this order preserving the status quo pending the final determination of this cause had not been made.

Dated this 24th day of Dec. 1935.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge. F. E. Kennamer, District Judge.

OK. E. R. Wright, J. R. Modrall, Asst. Atty. General. Geo. E. Remley. Ralph K. Pierson.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed December 24, 1935

Comes now the plaintiff, Howard Morf, doing business under the name and style of Pacific Wholesale Automobile Company, by his counsel, and in connection with his appeal, filed the following assignment of errors on which he will rely on his appeal to the Supreme Court of the United States from the final decree of the Three Judge District Court for the District of New Mexico, entered on the 24th [fol. 79] day of December, 1935.

I

The District Court erred in entering its decree of December 24th, 1935, and therein dismissing plaintiff's petition and denying to plaintiff a permanent injunction, perma-

nently enjoining the defendant, as Commissioner of Revenue of the State of New Mexico, from enforcing as against plaintiff, in his interstate commerce, the collection of the tax provided in Chapter 56 of the 1935 Session Laws of New Mexico.

II

The District Court, by the entry of its decree, erred in denying to the plaintiff the equal protection of the laws to him guaranteed in the Fourteenth Amendment to the United States Constitution.

III

The District Court by the entry of its decree, erred in permitting this plaintiff to be deprived of his property without due process of law, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

IV

The District Court, by the entry of its decree, erred in denying to this plaintiff his rights under and the protection of the Interstate Commerce Clause of Section 8 of Article I of the Constitution of the United States.

V

The District Court, by the entry of its decree, erred in ruling that Chapter 56 of the 1935 Session Laws of the State of New Mexico, in so far as said Chapter 56 purports to apply to said plaintiff in his interstate commerce, was not repealed by Chapter 136 of the 1935 Session laws of [fols. 80-88] said state.

VI

The District Court erred in making its finding of fact number 1 over the plaintiff's written objections and exceptions to the admissibility of certain of the stipulated facts, which objections and exceptions were filed herein on the 17th day of September, 1935.

VII

The District Court erred in making its findings of fact Numbers 2, 3, 4 and 5, over plaintiff's written objections and exceptions thereto, which said objections and exceptions were filed herein on the 18th day of December, 1935.

VIII

The District Court erred in entering its said decree upon the insufficient findings of fact by it made in this cause.

Wherefore, appellant prays that the said decree of the said District Court be reversed and for further and adequate relief in the premises.

Ralph K. Pierson, Compton, California; Samuel P. Block, Compton, California; Geo. E. Remley, Santa Fe, New Mexico, Attorneys for Appellant.

[fol. 89] In United States District Court

Praecipe for Record on Appeal, With Acknowledgment of Service—Filed December 24, 1935

To the Clerk of the District Court of the United States for the District of New Mexico:

For the purpose of a complete record on appeal in the foregoing case, please prepare, certify and transmit to the Sureme Court of the United States the following from the files and records of your court

1. Bill of Complaint and Amendments thereto.
2. Stipulation for Issuance of Temporary Restraining Order.
3. Restraining Order and Rule to Show Cause and Subpoena.
4. Acceptance of Service of Subpoena and Entry of Appearance by the defendant.
5. Return to Rule to Show Cause and Answer of Defendant.
6. Stipulation for Amendment by Interlineation in the Bill of Complaint.
7. Stipulation of Facts.
8. Plaintiff's Objections to the Admission in Evidence of certain of the Stipulated Facts.
9. Findings of Fact by the Court.
10. Decree.
11. Bill of Exceptions assigned, settled and sealed by the Court.
12. Petition for Appeal.

13. Order of Court Allowing Appeal and Granting Supersedeas.

[fol. 90] 14. Assignment of Errors.

15. Statement of Jurisdiction.

16. Defendant's Acknowledgment of Service of Copies of the Petition for Appeal, Order Allowing Appeal, Assignment of Errors and of Statement as to Jurisdiction.

17. Waiver of Citation.

18. Certificate of Presiding Judge.

19. This Praecipe.

20. Citation on appeal.

Ralph K. Pierson, Compton California. Samuel P. Block, Compton, California. Geo. E. Remley, Santa Fe, New Mexico.

IN UNITED STATES DISTRICT COURT

WAIVER OF ISSUANCE AND SERVICE OF CITATION

The issuance and service of the citation to appear in the Supreme Court of the United States in the above entitled case is hereby waived and receipt of a copy of the plaintiff's præcipe for the record is hereby acknowledged this 24th day of December, 1935.

J. R. Modrall, Asst. Atty. General; E. R. Wright, Attorneys for Defendant.

[fol. 91] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 92] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Feb. 21, 1936

Comes now the Appellant, Howard Morf, doing business under the firm name and style Pacific Wholesale Automobile Company, and, in conformity with Paragraph Nine of Rule Thirteen, states the points upon which he intends to rely and designates the parts of the record to be printed by the Clerk, as follows, to-wit:

I

Statement of Points Relied Upon

1. The District Court erred in entering its decree of December 24th, 1935, and therein dismissing appellant's petition and denying to appellant a permanent injunction, permanently enjoining the appellee, as Commissioner of revenue of the State of New Mexico, from enforcing against said appellant, in his interstate commerce, the collection of the tax provided in Chapter 56 of the 1935 Session Laws of the State of New Mexico.

2. The District Court, by the entry of its said decree, erred in denying to the appellant the equal protection of the laws to him guaranteed in the Fourteenth Amendment to the United States Constitution.

3. The District Court, by the entry of its said decree, erred in permitting this Appellant to be deprived of his property without due process of law, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

4. The District Court, by the entry of its said decree, erred in denying to this Appellant his rights under and [fol. 93] the protection of the Interstate Commerce clause of Section 8 of Article I of the Constitution of the United States.

5. The District Court, by the entry of its said decree, erred in ruling that Chapter 56 of the 1935 Session Laws of the State of New Mexico, in so far as said Chapter 56 purports to apply to said appellant in his interstate commorce, was not repealed by Chapter 136 of the 1935 Session Laws of the State of New Mexico.

6. The Court erred in over-ruling appellants objections to the admission in evidence of the facts set out in paragraphs XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIV, XXXVII of the stipulation of facts, and thereafter adopting said stipulated facts so objected to, as facts of its own finding.

7. The District Court erred in making its finding of fact number 2, 3, 4 and 5, over appellant's written objections and exceptions thereto.

II

Designation of the Parts of the Record to be Printed by the Clerk

1. Citation on appeal with acknowledgment of service.
2. Bill of complaint and amendments thereto.
3. Stipulation for issuance of temporary restraining order.
4. Temporary restraining order and rule to show cause.
5. Subpœna.
6. Acceptance of service of subpœna and entry of ap-p--reance of defendant.
7. Return to rule to show cause and answer of defendant.
8. Findings of fact by the Court, opinion of the court and decree.
9. Bill of exceptions.
10. Petition for appeal and order allowing same.
11. Order of *of* Court allowing appeal and granting supersedeas.
12. Assignment of errors.
13. Defendant's acknowledgment of service of copies of petition for appeal, order allowing appeal, assignment of errors and of statement as to jurisdiction.
14. Præcipe for record on appeal.
15. Waiver of citation.

[fol. 94] Ralph K. Pierson, Samuel P. Block, Geo. E. Remley, Attorneys for Appellant. Harry S. Bowman, Of Counsel for Appellant.

Receipt of copy and service of the above and foregoing statement of points relied upon and designation of the parts of the record to be printed by the Clerk of the United States Supreme Court, is hereby acknowledged this 17th day of February, A. D. 1936.

Quincy D. Adams, Assistant Attorney General of the State of New Mexico and attorney for Appellee.

[fol. 95] [File endorsement omitted.]

Endorsed on cover: File No. 40,326. New Mexico, D. C. U. S. Term No. 772. Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, appellant, vs. John D. Bingaman, Commissioner of Revenue for the State of New Mexico. Filed February 21, 1936. Term No. 772, O. T., 1935.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 772

HOWARD MORF, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PACIFIC WHOLESALE AUTOMOBILE COMPANY,
Appellant,

vs.

JOHN D. BINGAMAN, COMMISSIONER OF REVENUE FOR THE STATE OF NEW MEXICO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

STATEMENT AS TO JURISDICTION.

HARRY S. BOWMAN,
RALPH K. PIERSON,
SAMUEL P. BROOK,
GEO. E. REMLEY,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 772

HOWARD MORF, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PACIFIC WHOLESALE AUTOMOBILE COMPANY,
Appellant,

vs.

JOHN D. BINGAMAN, COMMISSIONER OF REVENUE FOR THE STATE OF NEW MEXICO.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

STATEMENT OF JURISDICTION.

Filed December 24, 1935.

In compliance with Rule 12 of the Supreme Court of the United States, Appellant herewith submits his statement showing the basis of the jurisdiction of this Court to entertain the appeal in the above entitled cause.

A.

Statutes.

This cause was tried before a statutory three judge court and the statutory jurisdiction of this Court to review by direct appeal the order or decree herein complained of is conferred by the Acts of March 4, 1913, Chapter 160, 37 Stat. 1013; February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; United States Code, Compact Edition, Title 28, Section 380.

It is provided by the last sentence of said section as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

The statute of the State of New Mexico, the validity of which is involved, is Chapter 56 of the 1935 Session Laws of the State of New Mexico, which said chapter is in words and figures following, to-wit:

CHAPTER 56.

AN ACT TO AMEND CHAPTER 139 OF THE SESSION LAWS OF 1933, RELATING TO REGISTRATION FEES FOR MOTOR VEHICLES, HOUSE BILL NO. 71; APPROVED FEBRUARY 21, 1935.

Be It Enacted By the Legislature of the State of New Mexico:

SECTION 1. That Chapter 139 of the Session Laws of 1933, be and the same is hereby amended to read as follows:

"11-321. Registration by non-residents.

"(a) A non-resident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the state, county or other place for which the owner is a resident and which at all times when operated in this state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fees to this state during a period of three months from the time such vehicle is first brought into this state.

"(b) A non-resident owner of a foreign vehicle operated within this state for the transportation of persons or property for compensation or for compensation or for the transportation of merchandise, shall register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state; Provided, however, that motor vehicles properly licensed in any other state or country, operated for compensation or hire, which are used exclusively in the transportation of livestock, lumber, farm or dairy products, from the place of production to market, or in the transportation of a return load of livestock, farm or dairy products or lumber, may be allowed to make trips within the state and remain on each trip within the state not exceeding four days, without being registered or required to pay the mileage or other fees, in this state, in the event that under the laws of such other state or country, similar or like exceptions are granted to motor vehicles registered under the laws of and owned by residents of this state.

"(c) Every non-resident, including any foreign corporation carrying on business within this state and owning and regularly operating in such business any motor vehicle, trailer or semi-trailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state, Pro-

vided, however, salesmen, agents or representatives with no permanent place of business in this state and who are traveling through the State for the purpose of calling on retailers, wholesalers or jobbers for the purpose of taking orders for future delivery, shall be required to register any motor vehicle used by them in such business and pay therefor a registration fee of Five ($5.00) Dollars, for which an appropriate license tax shall be furnished by the motor vehicle commissioner.

"(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Commissioner of Revenue of the State of New Mexico upon application on such form as said Commissioner may prescribe and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. All permits so issued shall be evidenced by certificates, issued by said Commissioner, which shall show upon the face thereof the

registration number assigned to each such vehicle, the name and address of the owner thereof, the manner of transportation thereby authorized and a description of the vehicle so registered including the engine number thereof. Such certificate shall be carried at all times by the person in charge of such vehicle or vehicles. A suitable tag or placard shall be issued by the Commissioner with such certificate and shall be at all times displayed on each such vehicle whether the same is being so transported singly or in a caravan. No such permit, certificate, tag or placard shall be used upon or in connection with the transportation of any vehicle other than the one for which the same is issued."

SECTION 2. That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico that this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this Act shall take effect and be in full force and effect from and after its passage and approval.

C.

Date of Judgment and of Application for Appeal.

The judgment and decree of the District Court was entered on the 24th day of December, 1935, and the petition for appeal was filed on the 24th day of December, 1935, and allowed on the 24th day of December, 1935.

Nature of the Case.

The petition of plaintiff was one seeking to enjoin John D. Bingaman as Commissioner of Revenue for the State of New Mexico from enforcing Chapter 56 of the 1935 Session Laws of the State of New Mexico against the plaintiff herein in his interstate commerce operations in so far as the same relate to the use of the highways of the State of

New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale as in subdivision (d) of said Chapter 56 provided.

The defendant filed his return to the rule to show cause and answer to the complaint wherein many of the allegations of plaintiff's petition were admitted and some were denied. Defendant also, by his answer, set up several defenses. A stipulation of facts, ultimate in character, to be considered by the court, was entered into between the parties to the cause and was filed in the case. In addition thereto oral testimony was introduced by both parties at the time of the trial of this cause.

Prior to the time of defendant's filing said return and answer a temporary restraining order was issued, and upon a hearing set upon the rule to show cause why a temporary injunction should not issue, it was agreed in open court between the court and the parties plaintiff and defendant that the matter should then and there be heard upon its merits, and that the judgment of the court should be final upon the question of whether a permanent injunction should be granted or denied.

The court took the cause under advisement and on the 30th day of November, 1935, filed its findings of fact and opinion, and thereafter, to-wit, on the 24th day of December, 1935, entered its final judgment dissolving the temporary restraining order, assessing defendant's damages and dismissing plaintiff's bill of complaint.

Ruling of the Court.

In its decree filed the court ruled that said Chapter 56 of the 1935 Session Laws of the State of New Mexico was not in contravention of nor repugnant to the due process clause and the equal protection clause of the Fourteenth Amendment of the United States Constitution, nor of the

commerce clause, to-wit, Section 8, Article 1 of said Constitution, and that said Chapter 56 was not repugnant to and had not been repealed by Chapter 136 of the 1935 Session Laws of the State of New Mexico, and was therefore a valid Act.

Cases Sustaining Jurisdiction.

The following decisions are believed to sustain the jurisdiction of this Court on an appeal from a decree from a statutory three judge court wherein the question involved is whether the State of New Mexico may levy a tax upon interstate commerce in its use of the highways for the transportation of a motor vehicle on its own wheels for the purpose of selling or offering for sale, as is provided in subdivision (d) of Chapter 56, 1935 Session Laws of the State of New Mexico:

Hendricks v. *Maryland,* 235 U. S. 610, 35 S. C. Rep. 140, 59 L. Ed. 385.

Clark v. *Poor,* 274 U. S. 554, 71 L. Ed. 1199.

Interstate Buses Corporation v. *Blodgett,* 276 U. S. 245, 72 L. Ed. 551.

Sprout v. *South Bend,* 277 U. S. 163, 72 L. Ed. 833.

Interstate Transit Co. v. *Lindsey,* 283 U. S. 183, 75 L. Ed. 953.

Aero Mayflower Transit Company v. *Georgia Public Service Commission,* 79 L. Ed. (Adv. Op.) 749.

Respectfully submitted,

RALPH K. PIERSON,
Compton, California;
SAMUEL P. BLOCK,
Compton, California;
GEO. E. REMLEY,
Santa Fe, New Mexico;
HARRY S. BOWMAN,
Counsel for Appellant.

APR 6 1936
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 772.

Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company,

Appellant,

vs.

John D. Bingaman, Commissioner of Revenue for the State of New Mexico,

Appellee.

BRIEF ON BEHALF OF APPELLANT

RALPH K. PIERSON,
SAMUEL P. BLOCK,
Compton, Calif.;
GEORGE E. REMLEY,
HARRY S. BOWMAN,
Santa Fe, N. M.,
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 772.

Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company,

Appellant,

vs.

John D. Bingaman, Commissioner of Revenue for the State of New Mexico,

Appellee.

BRIEF ON BEHALF OF APPELLANT
With Appendix.*

On appeal from the District Court of the United States for the District of New Mexico.

OPINION BELOW.

This cause was tried before a specially constituted District Court of the United States (Judicial Code, section 266; U. S. C., Title 28, section 380) and the opinion of

* Italics ours unless otherwise noted.

such District Court is reported in 12 Fed. Supp. 755 [R. 31-37]. The dissenting opinion of the Honorable Franklin C. Kennamer, District Judge, is reported at page 759 [R. 38-39].

STATEMENT OF THE CASE.

Appellant, plaintiff below, filed his Bill of Equity in the United States District Court for the District of New Mexico [R. 1-12], and later filed an Amendment to said Bill in Equity [R. 13-15], seeking to enjoin John D. Bingaman, as Commissioner of Revenue for the state of New Mexico, from enforcing Chapter 56 of the 1935 Session Laws of the state of New Mexico against the appellant in his interstate commerce operations, in so far as the same relates to the use of the highways of the state of New Mexico for the purpose of selling or offering the same for sale, as in section 1, subdivision (d) of said Chapter 56 provided.

Subdivision (d), section 1, of said Chapter 56, forbids any person to use the highways of the state for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale unless such vehicle is licensed by the state of New Mexico or is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license, without securing a special permit as therein authorized and paying the fees therein required. [R. 9-10; Appendix, Exhibit 1.]

The defendant filed his return to the rule to show cause and answer to the bill [R. 19-30] wherein many of the allegations of plaintiff's bill were admitted and some were denied. Defendant also, by his answer, set up several

defenses. A stipulation of facts [R. 42-50], ultimate in character, was entered into by the parties subject to the right to object thereto on the ground of irrelevancy or immateriality. In addition thereto, oral testimony was introduced by both parties at the time of the trial of the cause [R. 50-53].

Prior to the time of defendant's filing said return and answer, a temporary restraining order was issued [R. 16-17], and upon a hearing set upon the rule to show cause, it was agreed in open court between the court and parties plaintiff and defendant that the matter should then and there be heard upon its merits, and that the judgment of the court should be final upon the question of whether a permanent injunction should be granted or denied.

SUMMARY OF FACTS.

Appellant is a citizen and resident of the city of Los Angeles, California, and is engaged therein in the wholesale automobile business [R. 43]. He is not engaged in business in the state of New Mexico [R. 44]. In the operation of his business appellant purchases automobiles in various eastern and southern states of the United States, and causes them to be driven on their own wheels either under their own power, or in tow of another vehicle over the public highways to his place of business in California, for the purpose of sale and trade [R. 43-44]. Said automobiles are so transported through the state of New Mexico, entering at the city of Las Cruces, and departing from the state at Lordsburg, a distance of approximately one hundred sixty-six (166) miles [R. 44]. In causing said automobiles to be driven through the

state of New Mexico as aforesaid, appellant is engaged solely in interstate commerce [R. 33 and 45]. The vehicles are themselves the subject of such commerce. The appellee, defendant below, John D. Bingaman, is Commissioner of Revenue of the state of New Mexico, and is the official charged with the enforcement and collection of the fees specified in said subdivision (d), section 1, Chapter 56. In addition hereto, the stipulated facts refer to the manner in which appellant's motor vehicles are transported through the state of New Mexico [R. 46], and the cost to the said state of the maintenance of its highway facilities [R. 47-49]. Appellant objected and excepted to the admission of certain of these stipulated facts upon the ground of immateriality [R. 50]. The oral testimony was very brief, consisting of testimony by appellant with respect to the operations of his business [R. 50-51], and of a state police officer with respect to what is termed "caravan" operations on the highways [R. 52-53].

THE RULING OF THE DISTRICT COURT.

The trial court, in the findings of fact [R. 30-31] adopted the stipulation of facts theretofore entered into and found them all to be true [R. 31]. The court held that Chapter 56 was not unconstitutional in any of the respects alleged by plaintiff [R. 35-36], and further held that said Chapter 56, in so far as it affects this appellant, was not repealed by Chapter 136 [R. 36-37]. In holding said Chapter 56 not repealed by Chapter 136, the District Court held that the mileage tax required by section 8, Chapter 136, is supplemented by the flat fee or "special permit" tax provided by Chapter 56, and that appellant is subject to both taxes, as they are in harmony and

operate together [R. 37]. The opinion of the court was adopted as its conclusions of law, and for the reasons indicated therein, appellant's bill was dismissed for lack of equity [R. 37], and a decree was entered [R. 40] dissolving the temporary injunction, assessing damages, and dismissing the bill of complaint. Appellant duly excepted to the ruling of the trial court and filed his bill of exceptions [R. 41-55].

SPECIFICATIONS OF ERROR.

I.

The District Court erred in entering its decree of December 24th, 1935, and therein dismissing appellant's petition and denying to appellant a permanent injunction, permanently enjoining the appellee, as Commissioner of Revenue of the State of New Mexico, from enforcing as against appellant, in his interstate commerce, the collection of the tax provided in Chapter 56 of the 1935 Session Laws of New Mexico.

II.

The District Court, by the entry of its decree, erred in ruling that Chapter 56 of the 1935 Session Laws of the State of New Mexico, in so far as said Chapter 56 purports to apply to appellant in his interstate commerce, was not repealed by Chapter 136 of the 1935 Session Laws of said State.

III.

The District Court, by the entry of its decree, erred in denying to this appellant his rights under, and the protection of the interstate commerce clause of section 8 of article I of the Constitution of the United States.

IV.

The District Court, by the entry of its decree, erred in permitting this appellant to be deprived of his property without due process of law, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

V.

The District Court, by the entry of its decree, erred in denying to this appellant the equal protection of the laws to him guaranteed in the Fourteenth Amendment of the United States Constitution.

VI.

The District Court erred in making its finding of fact number 1 over the appellant's written objections and exceptions to the admissibility of certain of the stipulated facts, which objections and exceptions were filed herein on the 17th day of September, 1935.

VII.

The District Court erred in making its findings of fact numbers 2, 3, 4 and 5, over plaintiff's written objections and exceptions thereto, which said objections and exceptions were filed herein on the 18th day of December, 1935.

VIII.

The District Court erred in entering its said decree upon the insufficient findings of fact by it made in this cause.

SUMMARY OF ARGUMENT.

1. **Chapter 136, Laws 1935, Repeals Chapter 56, Laws 1935, In So Far as the Earlier Act Relates to the Interstate Commerce of Appellant and the Exaction of the Tax Therein Laid Is Violative of the Fourteenth Amendment to the Constitution of the United States.**

A comparison and study of Chapter 56 of the 1935 Session Laws, which became effective February 21st, 1935, and Chapter 136 of the same Session Laws, commonly known as the "Port of Entry Act," reveals that the former act is repealed by the latter. The mileage tax provided in the Port of Entry Act was intended entirely to supersede the flat tax exacted under Chapter 56. The Port of Entry Act is a valid exercise of the power of the state, and a studied substitute for Chapter 56, designed to avoid the unconstitutional interference with interstate commerce accomplished by subdivision (d), Chapter 56. The subject matter of the two acts is the same, and under the rule *expressio unius est exclusio alterius*, the mileage tax in the Port of Entry Act takes the place of the flat tax provided by Chapter 56. While repeals by implication are not favored, the Port of Entry Act effects such a repeal under the authorities cited. By exacting from appellant a tax under authority of a repealed statute, appellee deprives appellant of his property without due process of law. The District Court erred in holding that Chapter 56 was not repealed by Chapter 136, in so far as the same relate to the interstate commerce of appellant.

2. Chapter 56 of the 1935 Session Laws of the State of New Mexico Is Unconstitutional and Void as Repugnant to Section 8 of Article I of the Constitution of the United States, in Denying to Appellant His Rights Under the Interstate Commerce Clause.

The tax imposed is upon the privilege of engaging in interstate commerce. A tax upon motor vehicles engaged exclusively in interstate commerce, for the use of public highways, is valid only if compensatory, and therefore, must necessarily be predicated upon the use made, or to be made, of the public highways, or as cost of the policing thereof, occasioned by such use. This alone, however, is not sufficient. The tax cannot be upheld if it constitutes a discrimination against interstate commerce. The tax under Chapter 56 is not compensatory, nor predicated upon the use made of the public highways. It is discriminatory and unreasonable. It is a tax upon goods, to wit: motor vehicles, in transit, the subject of interstate commerce. Its effect is to raise an illegal economic barrier against products originating in states other than New Mexico. The District Court erred in holding that Chapter 56 was not unconstitutional as repugnant to the Interstate Commerce Clause.

3. **Chapter 56 of the 1935 Session Laws of the State of New Mexico Is Unconstitutional and Void as Repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States in That It Denies to Appellant the Equal Protection of the Laws.**

The statute unfairly discriminates against appellant's interstate commerce, and in favor of intrastate commerce carried on by automobile dealers of New Mexico, and the District Court erroneously held that resident dealers could not, under the provisions of the statute, caravan automobiles into the state without payment of the tax. No proper classification is created by the statute. The attempted classification is defined by two limitations, (1) "Any motor vehicle on its own wheels." (2) "For the purpose of selling or offering the same for sale." Such classification does not rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation, and the same is arbitrary and unreasonable. No attempt is made by the statute to make a classification of vehicles moving in integrated fleets or groups. The classification created simply raises an economic barrier against goods seeking their market, to-wit, automobiles. The classification attempted is palpably arbitrary, capricious, unreasonable and discriminatory, and the District Court erred in holding that Chapter 56 was not unconstitutional in that it denies to appellant the equal protection of the laws.

4. **The District Court erred in Overruling Appellant's Objection to Admission in Evidence of the Facts Set Out in Paragraphs XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, XXX, XXXII, XXXIV and XXXVII of the Stipulation of Facts, and in Thereafter Adopting Said Stipulated Facts So Objected to, as Facts in Its Own Finding.**

In said stipulation of facts the right to object thereto on the ground of irrelevancy or immateriality was reserved [R. 49]. The facts contained in the paragraphs admitted in evidence over appellant's objections and found by the court to be true were entirely irrelevant and immaterial to the issues involved in the trial of the cause.

5. **The District Court Erred in Making Its Findings of Fact Numbers 2, 3, 4 and 5, Over Appellant's Written Objections and Exceptions Thereto.**

The said findings are not substantiated by any competent evidence in the cause, and are contrary to the evidence introduced.

6. **The District Court Erred in Entering Its Said Decree Upon the Insufficient Findings of Fact Made by It in This Cause.**

The findings made by the District Court are insufficient to support the decree.

POINT I.

Chapter 136, Laws of 1935, Repeals Chapter 56, Laws of 1935, In So Far as the Earlier Act Relates to the Interstate Commerce of Appellant, and the Exaction of the Tax Therein Laid, Violates the Fourteenth Amendment of the Federal Constitution in That It Deprives This Appellant of His Property Without Due Process of Law. (Specifications of Error Nos. I, II and IV.)

History and Discussion of the New Mexico Statutes Involved.

The whole general subject of motor vehicle registration and license in New Mexico was originally dealt with by the enactment of Chapter 119, Laws 1929, now appearing in the "New Mexico Statutes Annotated, 1929 Compilation" as sections 11-301 to 11-341, inclusive.

Section 21 of this original act (Sec. 11-321 of the 1929 Compilation) relating to the registration and license of motor vehicles of non-resident owners, was amended in 1933 and again by the enactment of Chapter 56, Laws of 1935, effective February 21, 1935. [R. 8-10; Appendix, Exhibit I.] This last amendment consisted of re-enacting the old provisions and adding thereto subdivision (d), section 1, Chapter 56, under the provisions of which the New Mexico Commissioner of Revenue, appellee herein, compels appellant to pay the tax therein provided for, as a condition precedent to appellant's use of the highways of the State of New Mexico, for the transportation of "any motor vehicle on its own wheels for the purpose of selling or offering the same for sale."

This act became a part of the original, general motor vehicle registration and licensing act (Chapter 119, Laws

1929, *supra*) and should be read in the light of the other provisions thereof. So read, its purpose is to raise revenue, rather than to effect safety in traffic and police supervision thereof.

Among the other provisions of this licensing act, section 31 thereof (Secs. 11-331, Comp. 1929) provided for the allocation and disposition of the tax collected under that act. This section 31 was successively amended by section 6, Chapter 77, Laws of 1931, by section 6, Chapter 169, Laws of 1933, and finally by Chapter 93, Laws of 1935. [Appendix, Exhibit III.]

Under the provisions of this act in its final form, each dollar exacted from appellant by appellee under the provisions of Chapter 56, Laws of 1935, is allocated and disposed of as follows:

Expense of administering general registration and licensing act (Chap. 119, Laws 1929)	$ .06
State road fund	.423
County road fund	.141
State general fund	.141
School funds, County and District	.235
	$1.00

It is thus seen that 43.6 cents are used for purposes in no way relating to the construction or maintenance of highways or to the policing thereof in the interest of public safety. Of the remaining 56.4 cents, only 42.3 can be used in maintaining state as distinguished from county highways. It is to be noted that State Highway No. 80 is the only highway within the State of New Mexico used by appellant [R. 44].

REPEAL OF CHAPTER 56, LAWS OF 1935, HAS BEEN EFFECTED.

Chapter 56, Laws of 1935, was an emergency act and was approved and became effective February 21, 1935. A week later, February 28, 1935, Chapter 136, Laws of 1935, commonly called the "Port of Entry Act," was approved. This was not an emergency act. [Appendix, Exhibit II.]

This last mentioned act speaks only of interstate commerce, concerning motor vehicles using the public highways. The act covers the "Transportation of Property" into the state and thereafter over the roads of the state by such means. (See Secs. 1, 3, 4, 5, and 6 (e).)

Ports of entry are established (Sec. 3) through which such commerce must enter, be inspected and registered (Secs. 3 and 4) and from which it may not proceed further into the state without clearance certificate (Sec. 5), and only then after the payment of a tax, based upon the mileage to be traveled within the state, and weight of vehicle, *or* upon the payment in lieu of such mileage tax, should the owner so elect, of the fees required for license plates under the general registration and license act (Chapter 119, Laws 1929), *rather than the payment of the fee required for a special permit under the provisions of Chapter 56, Laws 1935.*

This Port of Entry Act (Chapter 136) contains elaborate provisions requiring:

1. Disclosure of identity of car, operator and owner;
2. Inspection to ascertain if lights, brakes and vehicle are in such condition as permits of safe operation upon the highways;

3. Inspection of car and contents in the interests of "public safety, health, welfare and comfort";
4. Compliance with law regulating the hours of service of drivers and chauffeurs;
5. Designation of exact route to be followed.

(See Sec. 4.)

These are all police measures intended to be enacted for the purpose of public safety in appellant's use of the roads.

In addition the act requires the disclosure of the weight of the vehicle and its load and the number of taxable miles to be traveled over the route specified (Sec. 4), for the purpose of computing the mileage tax to be paid (Secs. 6 (e) and 8), and forbids more than one trip (Sec. 7).

The proceeds of this mileage tax are to be used for the administration of the act and for the maintenance, repair and reconstruction of public roads (Sec. 8). Such proceeds are thrown into a suspense fund and thereafter allocated. (Secs. 10 and 11.)

Certain acts are declared unlawful (Sec. 14) and penalties and punishments are imposed (Sec. 15).

Specifically, Section 13 of the act treats of that particular class of interstate commerce engaged in by this appellant, which, *in almost the identical wording,* is likewise covered in the earlier act by the provisions of subsection (d) of section 1, of Chapter 56. [Appendix, Exhibit I.]

Patently Chapter 136 [Appendix, Exhibit II] is a legislative effort to cover the entire subject of interstate use of highways, and to avoid all inhibitions of the Federal Constitution against the state's unconstitutional inter-

ference with interstate commerce, which inhibitions Chapter 56 had not succeeded in avoiding.

In each act, the transportation of a motor vehicle in the state, over the highways and under its own power or when being towed by another, is arbitrarily classified as a subject of taxation, but only in the event that such transportation is for the purpose of sale.

The earlier act, for this class of transportation, *fixes an arbitrary tax, which bears no relation to the extent or method of appellant's use of the roads and which is not reasonably compensatory therefor. It makes no provision for police regulation or for promoting public safety.* It speaks of both interstate and intrastate transportation.

The later act leaves untouched the provisions of the earlier, relating to intrastate transportation of the character here considered, *but provides elaborately for the regulation and taxation of interstate transportation of the same character.* It imposes a tax, computed upon *mileage and weight* (Secs. 6 (e) and 8) in an effort to make that tax *fairly compensatory* of the character and extent of appellant's use of the roads.

In these and in its other provisions, it seemingly seeks to cure the defects of the earlier act in so far as interstate commerce is concerned, and to bring itself within the permissive purview of the Federal Constitution. It expressly requires appellant to follow a specified route on leaving a port of entry and his clearance certificate is valid for only the one specific trip. (Sec. 7.) No such limitation is imposed upon intrastate transportation of the same character by Chapter 56, under which intrastate transportation is free to roam the state at will over such highways, with limitless mileage and for such period of time as it

desires, nor is it required to call at a port of entry. Unconstitutional discrimination against appellant in his interstate commerce results. With this result, can it be assumed that the Legislature intended anything other than repeal?

The later act imposes only one tax, a mileage tax, *but in lieu thereof*, gives the owner of a vehicle the *option* of paying the fees required for regular license plates under the general registration and license law. (Sec. 8, Chapter 136.) This option expressly evidences an intention to retain these regular license plate fees in full force and effect. But this option contains no terms giving appellant the right to pay the tax for the "special permit" required under Chapter 56. This is significant, and clearly indicates that the right to collect these "special permit" taxes was not intended to be retained.

Because the later act lays but one tax, a mileage tax, the rule *"expressio unius est exclusio alterius"* would seem to limit the taxes which may lawfully be exacted from this appellant to the mileage tax laid in the later act, unless he exercises the option therein granted. In the event such option should be exercised, the "special permit" tax required by subdivision (d), Chapter 56, could not conceivably be exacted, *for in such event appellant's motor vehicle would be "licensed by the State of New Mexico," and by the express provisions of subdivision (d), subsection 1, Chapter 56, would be exempted from the payment of such "special permit" tax.* Herein, we submit, is shown the fallacy of the holding of the District Court [R. 37] that the "mileage tax shall supplement the flat fee." It is clearly to be seen that to carry the holding of the District Court to its logical conclusion, appellant, if he elected to pay the mileage tax, would also be required to

pay the "special permit" or flat fee, but if he elected to secure regular license plates, which election is expressly given him by section 8, Chapter 136, he would not be required to pay such "special permit" or "flat tax" fee. Such result would be manifestly contradictory, and leads to the conclusion that it was not the intention of the Legislature to require the payment of two taxes.

Freely admitting that repeals by implication are not favored, yet this rule gives way to the exception, that if the later act is on the same subject and is so broad in its terms and so clear and explicit in its words as to show it was intended to cover the whole subject, and, therefore, to displace the prior act their repeal is effected, and certainly to the extent of any repugnancy and conflict.

U. S. v. Lee Yen Tai, 185 U. S. 213, 221, 222;
Frost v. Wenie, 157 U. S. 46, 58;
James v. County Commissioners, 24 N. M. 509, 174 Pac. 1001.

Under the rules of construction above mentioned, the appellant contends, that in so far as Chapter 56, Laws of 1935, authorize the exaction of a tax from appellant as a condition precedent, or otherwise, to his use of the highways in his interstate commerce a repeal is effected, and such such exaction deprives appellant of his property without due process of law in violation of the Federal Constitution.

In addition, section 17 of Chapter 136 provides:

"All acts or parts of acts in conflict herewith are hereby repealed."

Chapter 56, subdivision (d), is in conflict with the provisions of Chapter 136 and hence by virtue of section 17, above quoted, is repealed.

POINT II.

Chapter 56 of the 1935 Sessions Laws of the State of New Mexico Is Unconstitutional and Void as Repugnant to Section 8 of Article I of the Constitution of the United States. (Specifications of Error Nos. I and III.)

A STATE MAY NOT LAY A TAX UPON THE PRIVILEGE OF ENGAGING IN INTERSTATE COMMERCE.

The above rule is well settled, and is accurately expressed in the case of *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, where the court, at page 392, said:

> "But a state cannot tax interstate commerce, it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it."

It is submitted that the instant cause is novel in this respect: That the motor vehicles, the transportation of which, for a specified purpose, *i. e.*, sale, is the *subject* of the tax levied by Chapter 56, are, in and of themselves goods, wares and merchandise, *the subject of interstate commerce*. None of the decisions of this court concerning motor vehicle taxation for use of highways, which have come to our attention, have involved a factual situation of this nature.

The tax imposed by Chapter 56 is clearly levied not for the use of the highways, but upon the business of appellant to which such use is incidental. In other words, if said motor vehicles are transported for any purpose other than sale, the collection of the tax is precluded by the wording of the statute. The tax, therefore, is *not* upon

the use, *but rather upon the purpose, i. e.,* sale, which is the business of this appellant.

> "Thus, the States cannot tax interstate commerce, either by laying a tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. *Similarly, the States may not tax property in transit in interstate commerce.*"
>
> *Minn. v. Blasius,* 290 U. S. 1, at page 9.

See also:

Sprout v. South Bend, 277 U. S. 163;
Interstate Transit v. Lindsey, 283 U. S. 183;
West v. Kansas Natural Gas Co., 221 U. S. 229.

Requirements of Valid Motor Vehicle Tax for Use of Highways in Interstate Commerce.

Article I, section 8, of the Federal Constitution, grants to Congress the power to regulate commerce with foreign nations and among the several states. Familiar as we know the court to be with its language, we quote a portion as follows:

> "The Congress shall have power * * * to regulate commerce with foreign nations and among the several states * * *."

Under this section, the principle has long been recognized by judicial decisions of this Honorable Court that, subject to certain fundamental limitations, a state may

legislate on inspection laws, quarantine laws, and various other police regulations, local rather than of national character; also, where special facilities owned by the state are used, such as wharves, reasonable compensation may be exacted, even though interstate commerce be indirectly affected. In the case of *Hendricks v. Maryland*, 235 U. S. 610, this court recognized the right of a state, in the absence of national legislation, to exact compensation for the use of public highways, constituting as they do "special facilities" furnished by the state.

In the last cited case, as in the cases of inspection, quarantine, and taxing power in connection with the use of special facilities, such as wharves, the states within their power to act with respect to interstate commerce, are subject to certain restrictions and limitations, and such restrictions and limitations are as well defined as is the power itself.

In respect to legislation of the character which is here involved, such restrictions and limitations are:

First: The tax is valid only if compensatory, and therefore must necessarily be predicated upon the *use made, or to be made, of the public highways or upon the cost of the administration and policing thereof, occasioned by such use.*

Second: That, even though, when measured by the above rule, the tax be valid, *the same cannot be upheld if it constitutes a discrimination against interstate commerce.*

It is only by virtue of the fact of compliance with both of the above limitations, that a tax may be prevented from constituting a direct burden on interstate commerce. These limitations are clearly delineated by the following cases:

Hendrick v. Maryland, 235 U. S. 610;

Kane v. New Jersey, 242 U. S. 160;

Sprout v. South Bend, 277 U. S. 163;

Interstate Transit v. Lindsey, 283 U. S. 183;

Clark v. Poor, 274 U. S. 554;

Sproles v. Binford, 286 U. S. 374;

Michigan Pub. Utilities Com. v. Duke, 266 U. S. 570;

Buck v. Kuykendall, 267 U. S. 307;

Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U. S. 45;

Morris v. Duby, 274 U. S. 135;

Interstate Busses Corp. v. Blodgett, 276 U. S. 245;

Continental Baking Co. v. Woodring, 286 U. S. 352;

Hicklin v. Coney, 290 U. S. 169;

Aero Mayflower Transit Co. v. Georgia Pub. Serv. Com., 295 U. S. 285;

Prouty v. Coyne, 55 F. (2d) 289.

THE TAX IS NOT COMPENSATORY.

The tax exacted by Chapter 56 is a flat tax and substantial in amount. Section 8, Chapter 136, provides for the payment of a mileage tax against motor vehicles described in subsection (e) of section 6 of said Chapter 136, based upon gross weight. Where the gross weight of vehicle and cargo does not exceed fifteen thousand (15,000) pounds one and one-half (1½) cent per mile; where gross weight of vehicle and cargo exceeds fifteen thousand (15,000) pounds, but does not exceed twenty-five thousand (25,000) pounds, two (2) cents per mile; and where gross weight of vehicle and cargo exceeds twenty-five thousand (25,000) pounds, three (3) cents per mile.

Section 13 of said Chapter 136 provides as follows:

> "The term, 'Transportation of Property,' as used in this act, shall not only include the transportation of property in or on a motor vehicle, *but shall also be construed to include the driving or moving on the public highways of any motor vehicle either under its own power or by being pulled by another motor vehicle when said vehicle or vehicles are to be sold or offered for sale to or by any agent, dealer, purchaser or prospective purchaser.*"

Thus section 13 brings this appellant within subsection (e) of section 6 of said Chapter 136, and makes appellant subject to the payment of the mileage tax based upon the above mentioned gross weight.

Appellant purchases new and used motor vehicles of the pleasure type only; all have pneumatic tires, *and none weigh over five thousand (5,000) pounds* [R. 50]. Appellant travels over the highways of New Mexico a dis-

tance of 166 miles, consuming approximately seven hours [R. 44].

If it were construed that appellant is subject only to the tax required by subdivision (d) of Chapter 56, it will thus be seen that for the charge of $7.50 for each single vehicle or the vehicle pulling another vehicle, *appellant is required to pay approximately four and one-half (4½) cents per mile*, and where the charge of $5.00 is required for a vehicle pulled, *appellant is required to pay approximately three (3) cents per mile*, even though in both instances, *the motor vehicle does not exceed five thousand (5,000) pounds.*

Under the mileage tax requirements of section 8, Chapter 136, *a vehicle weighing twenty-five thousand (25,000) pounds would only be required to pay three (3) cents per mile.*

If, as the District Court holds, the provisions of both statutes are in harmony, and the one supplements, or is in addition to the other, then appellant will be required to pay an additional one and one-half (1½) cent per mile, making a total of six (6) cents per mile and four and one-half (4½) cents per mile respectively. *This lays upon lighter vehicles transported by appellant a far greater tax per mile than upon vehicles of much greater weight.*

For example, a huge truck, with load, weighing in exces of twenty-five thousand (25,000) pounds, is required to pay only three (3¢) cents for each mile traveled. If it pulls a trailer, weighing in excess of twenty-five thousand (25,000) pounds, as we construe the law, the trailer would also pay three (3¢) per mile for each mile traveled. It will thus be seen that a pleasure type vehicle, *weighing, at*

the most, only one-fifth as much, and traveling, as do appellant's vehicles, directly through the state, a distance of one hundred and sixty-six (166) miles, is required to pay six (6¢) per mile if driven singly, and if it be in tow of another vehicle, four and one-half (4½¢) per mile. The only basis for the additional charge is that in the latter instance, *the vehicles are being moved for the purpose of sale, which is the business in which this appellant is engaged.* Certainly it will not be contended that a vehicle of the pleasure type, weighing not in excess of five thousand (5,000) pounds, will cause twice as much damage to the highways as a truck weighing in excess of twenty-five thousand (25,000) pounds.

In *Sprout v. South Bend,* 277 U. S. 163, at page 170, it was said:

> *"A flat tax,* substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, *only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."*

Like the tax in *Sprout v. South Bend, supra,* the exaction under subdivision (d) of Chapter 56, is a flat tax, substantial in amount, and it may be said thereof, as was said of the tax in that case, that it "could hardly have been designed as a measure of the cost or value of the use of the highways."

In *Interstate Transit Co. v. Lindsey,* 283 U. S. 183, the court had under consideration a statute of Tennessee imposing upon interstate motor bus transportation a privi-

lege tax graduated according to carrying capacity. The court, at page 185, declared:

"While a state may not lay a tax on the privilege of engaging in interstate commerce (Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 62 A. L. R. 45, 48 S. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, *which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon.* (Kane v. New Jersey, 242 U. S. 160, 168, 169, 61 L. ed. 222, 227, 228, 37 S. Ct. 30; Clark v. Poor, 274 U. S. 554, 71 L. ed. 1119, 47 S. Ct. 702; Sprout v. South Bend, *supra* (277 U. S. 169, 170, 72 L. ed. 836, 837, 62 A. L. R. 45, 46, 48 S. Ct. 502).) As such a charge is a direct burden on interstate commerce, *the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use* (Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 S. Ct. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, *supra,* or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland, 235 U. S. 610, 612, 59 L. ed. 385, 35 S. Ct. 140; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252, 72 L. ed. 551, 554-555, 48 S. Ct. 230. Compare Interstate Busses Corp. v. Holyoke St. R. Co., 273 U. S. 45, 51, 71 L. ed. 530,

534, 7 S. Ct. 298. *But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity.*"

Further, at page 190:

"It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for the use of the highways. It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare Gundling v. Chicago, 177 U. S. 183, 189, 44 L. ed. 725, 729, 20 S. Ct. 633. But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, *cannot be tested by standards which generally determine the validity of taxes.* Being valid only if compensatory, the charge *must be necessarily predicated upon the use made, or to be made, of the highways of the state.* Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, *supra.* In the present act the amount of the tax is not dependent upon such use. *It does not rise with an increase in mileage traveled,* or even with the number of passengers actually carried on the highways of the state. *Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights,* except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, *there is here no sufficient relation between the measure employed and the extent*

or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

The holding in the *Interstate Transit Co. v. Lindsey* case is applicable to the case at bar. The statute in that case held invalid made a small gesture toward measurement of the tax by seating capacity. On the other hand subdivision (d), Chapter 56, shows no attempt whatsoever to apportion the tax to the use made of the highways. Not only, as was said of the tax in the *Interstate Transit Co.* case, *supra*, is the tax unrelated to mileage traveled, degree of wear and tear incident to use, size or weight of vehicle, but such tax is not predicated upon any standard whatsoever, and reflects only the arbitrary decision of the Legislature.

See also:

Prouty v. Coyne, 55 Fed. (2d) 289.

CONFLICT IN REASONING OF DISTRICT COURT ON THIS POINT.

The trial court, in attempting to justify the "flat tax" feature of subdivision (d), Chapter 56, states [R. 35-36]:

"Certainly the exaction of a flat charge for such transportation, instead of graduating it upon a mileage basis which conceivably could entail substantial administrative difficulty and expense, cannot be said to constitute discrimination."

We cannot reconcile such reasoning with the fact that, as heretofore shown, there *actually is in existence* a tax graduated upon a weight-mileage basis, and particularly in view of the court's holding that,

> "it indicates persuasively an intent in the later instance to require both; *in other words that the mileage tax shall supplement the flat fee.*" [R. 37.]

In other words, after first attempting to justify the levy of a flat tax, by referring to difficulties of administration of a graduated tax based upon mileage, the court then proceeds to rule that such graduated mileage tax was intended to be in addition to, and supplemental of such flat tax. This reasoning would seem to defeat itself.

The administrative difficulties of charging appellant on a mileage basis would be practically nil, since only one trip is made through the state by each vehicle, for a known distance.

As heretofore shown, only 42.3 cents of each dollar exacted from appellant under subdivision (d) of Chapter 56, is allocated to the administration, regulation, construction or maintenance of public state highways. The rule seems well established by decisions of this court that the tax must be expended for the purpose of regulating, maintaining and constructing the highways subject to the use. Thus, in *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Com.*, 295 U. S. 285, 289, the court said:

> "It goes into a fund for the upkeep of highways which cariers must use in the doing of their business; * * *"

A research of the point now being discussed discloses no decision sustaining such a tax where the proceeds thereof were not paid into a fund to be expended for the

administration, regulation, maintenance and construction of the highways used. A lone remark is found in the case of *Clark v. Poor*, 274 U. S. 554, 557, where it was said:

> "It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose, and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

However, in the case of *Interstate Transit Co. v. Lindsey, supra*, 283 U. S. 183, 186, the court says:

> "This may be indicated by the nature of the imposition, such as a mileage tax, directly proportioned to the use (Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 S. Ct. 230), *or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, supra, or otherwise.*"

A footnote following the last quoted statement is contained in 75 L. ed. 967, as follows:

> "The Ohio statute there involved (Clark v. Poor) declared that the taxes were laid and were to be used only for, the maintenance and repair of highways and for the regulation of motor traffic. Ohio Gen. Code, Secs. 614-94, 614-96. The 'other purposes,' referred to in the opinion, 274 U. S. at p. 557, 71 L. ed. 1200, 47 S. Ct. 702, were the general expenses of the state motor vehicle department as distinguished from expenditures specifically upon the highways."

POINT III.

Chapter 56 of the 1935 Session Laws of the State of New Mexico Is Unconstitutional and Void as Repugnant to Section I of the Fourteenth Amendment to the Constitution of the United States, in That It Denies to Appellant the Equal Protection of the Laws. (Specifications of Error Nos. I and IV.)

CLASSIFICATION FOR PURPOSES OF TAXATION MUST BE REASONABLE.

By a lengthy line of decisions of this Honorable Court, the rule has been established, that the equal protection of the laws guaranteed by the Fourteenth Amendment means subjection to equal laws applying alike to all in the same situation, and that,

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, *such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed;* and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, canot be justified by calling it classification."
>
> *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417.

On the same point, we refer to:

Bowman v. Lewis, 101 U. S. 22;

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540;

Power Mfg. Co. v. Saunders, 274 U. S. 490.

The police power of the state is subordinate to, and must be exercised in such manner as not to violate the equal protection clause.

Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56.

The exercise, by the state, of the power of taxation, is also subject to the inhibition of the equal protection clause.

County of San Mateo v. Southern Pac. Ry. Co. (The Railroad Tax Cases), 13 Fed. 722.

Analysis of Dimensions of Classification Under Chapter 56.

The classification created by Chapter 56 is defined by two limitations. The first is expressed in the words of the statute as follows: *"Any motor vehicle on its own wheels."* The second limitation or dimension of the classification is as follows: *"For the purpose of selling or offering the same for sale."*

It cannot be denied that these two characteristics are the only ones necessary to render the vehicle subject to the tax, and that the latter characteristic, *"for the purpose of selling or offering the same for sale,"* is the dominant one. For it is the latter characteristic which subjects the motor vehicles owned by appellant to the payment of the tax, distinguishing such automobiles from all other types of motor transportation moving upon the highways of the State of New Mexico.

THE CLASSIFICATION DOES NOT REGULATE GROUP MOVEMENTS OF AUTOMOBILES.

A proper tax classification of vehicles moving in integrated groups or fleets might be proper, but the statute in question does not accomplish such a classification. The tax is levied alike upon vehicles moving in fleets *and upon vehicles moving singly*, so long as the same are goods seeking their market; this is accomplished, despite the fact that a vehicle moving singly over the highways, though it may be for the purpose of sale, cannot conceivably cause greater wear on the highways or policing expense than the same vehicle using the highways of the state for any other purpose either commercial or otherwise. Twenty to twenty-five per cent of the motor vehicles moved through the State of New Mexico by appellant are driven singly; that is, not hooked to any other car [R. 51].

As pointed out by the Honorable Franklin E. Kennamer, District Judge, in the dissenting opinion written in this cause after trial in the District Court [R. 39], an examination of the taxing statute discloses that the tandem practice of transportation is encouraged rather than penalized in proportion to increase in expense and hazard. Single vehicles, whether moving in conjunction with larger groups or not, are taxed $7.50 per vehicle. Vehicles in tandem (which the state contends are responsible for the most danger and damage on the highways) pay at the rate of $7.50 for the lead car and $5.00 for the towed car, thus offering a discount of $2.50 on the gross tax levied on two automobiles. This, rather than regulating and decreasing the alleged hazards complained of, actually offers a premium for the complication of the traffic problems of the state.

Rather than regulating group or fleet movement of automobiles, which movements might conceivably form a proper classification for tax purposes, the provisions of Chapter 56 contain no reference thereto (excepting in so far as the reference to a towed vehicle may be so considered). Under the express provisions of such statute, a private individual transporting an automobile upon the highways, for the purpose of selling the same, either in or out of the State of New Mexico, would be required to pay the tax.

The Statute Is Not a Police or Regulatory Measure.

It may well be said of the statute under consideration, in the words of the court in *Frost v. Railroad Commission,* 271 U. S. 583, 591:

> "It is very clear that the act as thus applied, is in no real sense a regulation of the use of the public highways. *It is a regulation of the business of those who are engaged in using them.*"

If the object of the statute were to promote the public safety in relation to traffic on the highways, it would be reasonable to suppose that it would provide restrictions as to the number of vehicles permitted to proceed in caravan or group formation, the manner in which towed automobiles must be connected, the speeds at which such traffic might travel, requirements as to operators thereof, and similar provisions, possibly going as far as to require long processions to proceed under convoy or escort. The statute attempts none of these regulations, and is neither in form nor in substance, a regulatory enactment under the police power of the state. It must properly be treated

simply as a revenue raising measure. We have heretofore, in Point II of the argument, *supra*, given our contentions that the tax is not reasonable, or compensatory of the use of the highways.

CLASSIFICATION CREATED IS UNRELATED TO ALLEGED OBJECTS OF THE STATUTE.

Considering the dominant characteristic of the classification, *"for the purpose of selling or offering the same for sale,"* it must be apparent that the classification is unreasonable, arbitrary and capricious, and bears no substantial relation to the alleged purposes of the statute. The tax is levied upon the vehicles *only in the event they are being transported for sale, and hence, only when they are merchandise the actual subjects of interstate commerce or goods seeking their market, and in transit for such purpose.* The state may not tax property in transit in interstate comerce.

Minn. v. Blasius, 290 U. S. 1.

If the purpose of the transportation is not to sell the vehicle, then under the express provisions of the statute, the tax cannot be exacted. For example, any person could transport upon the highways of the state, on their own wheels or in tow of others, any number of automobiles, singly or in groups, for the purpose of using them in a taxicab business, an auto-rental business, a delivery business, *or for any other purpose, commercial or non-commercial, except the purpose of sale,* and such person would not be required to pay the tax. This is not only unreasonable, but it is discriminatory.

Such *"purpose of sale"* may have already been accomplished before the vehicle entered the State of New Mexi-

co, since title may pass without possession; or, as would more usually be the case, such *"purpose"* may not be accomplished until the automobile finally comes to rest either in the State of New Mexico or in some other state. Such *"purpose"* would seldom, if ever, be accomplished during the short period of actual use of the highways. How then, can such "purpose" of intended sale, *existing only in the mind of the owner of the automobile,* bearing no relation to the use of the highways, to the damage or deterioration thereof, the hazards or dangers thereon, or the regulation and policing thereof, form the basis of a valid classification for the purpose of taxation? Such classification is arbitrary, unreasonable, capricious and discriminatory. In the exercise of the police power of the state, the legislature is not concerned with the purposes for which automobiles are transported (so the same be legitimate) *but only with the manner in which the highway is used.*

SUBDIVISION (D) CHAPTER 56 UNLAWFULLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

"Of course, the state may not discriminate against interstate commerce."

Morris v. Duby, 274 U. S. 135, 143.

SUBSECTION 1 OF SUBDIVISION (d) EXEMPTS MOTOR VEHICLES LICENSED BY STATE OF NEW MEXICO.

This in itself constitutes an unlawful discrimination against the transporters of motor vehicles licensed by and originating in states other than New Mexico. Further, this constitutes a real discrimination against interstate commerce and in favor of intrastate commerce, for it is

a commonly known fact, of which the court can take judicial notice, that automobiles licensed in New Mexico, and transported upon the highways thereof for the purpose of sale, are in the great majority of instances the subjects of intrastate, as distinguished from interstate commerce, whereas automobiles bearing foreign licenses, transported upon the highways of New Mexico for the purpose of sale, are necessarily the subjects of interstate commerce. Motor vehicles transported by appellant over the highways of the State of New Mexico bear registration plates of states in which they are purchased, but none bear New Mexico license plates [R. 51].

It is well established that a state by its laws may not discriminate in favor of intrastate as against interstate commerce, nor in favor of products having their origin in such state and against those originating in other states. The situation is analogous to that presented in *Bethlehem Motors Corp. v. Flynt*, 256 U. S. 421, where the court declared:

> "The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the state; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another state, some of its products only at a given time being within the state. Therefore, there is a real discrimination, and are offenses against the 14th Amendment, * * *."

In *Aero Mayflower Transit Co. v. Georgia Public Service Commission, supra*, it was said of the fee charged:

> "It is exacted *without hostility to foreign or interstate transactions*, being imposed also upon domestic vehicles operated in like conditions."

The tax is, in effect, a discriminating tax imposed by a state operating to the disadvantage of the products of another state, such as was denounced in the case of *Walling v. Michigan,* 116 U. S. 446.

On the same point:

Voight v. Wright, 141 U. S. 62;

Sonneborn Bros. v. Keeling, 262 U. S. 506;

Welton v. Missouri, 91 U. S. 275;

I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113;

Baldwin v. Selig, Inc., 294 U. S. 511;

Webber v. Virginia, 103 U. S. 344.

SUBSECTION 2 OF SUBDIVISION (d), CHAPTER 56, EXEMPTS MOTOR VEHICLES OWNED BY AN AUTOMOBILE DEALER, DULY LICENSED BY THE STATE OF NEW MEXICO, AND OPERATED UNDER A DEALER'S LICENSE.

The District Court held on this contention [R. 36] that the effect of the last mentioned provision was not to give dealers licensed in New Mexico the right to transport automobiles over the highways for the purpose of sale, without payment of the special permit fee under Chapter 56, but that they are permitted to use dealer's plates for demonstration purposes only. Even if this reasoning were valid, it is to be noted that demonstration of automobiles is very closely connected to the purpose of sale, which usually follows from such demonstration. However, we are unable to follow the reasoning of the court in this respect, which apparently adopted the views of appellee ex-

pressed in the return to the rule to show cause [R. 26]. Even in such return, it is stated:

> "that said sub-paragraph 2 only saves to said automobile dealers licensed by New Mexico the rights which they had by virtue of Sections 11-319 and 11-330 of the Code of New Mexico, of operating motor vehicles for *purposes of demonstration and sale* only, prior to the enactment of House Bill No. 71, and does not confer upon them any new or additional rights." [R. 26.]

Since Chapter 56 refers, in subdivision (d) to automobiles transported for the sole purpose of sale, it is hard to conceive why such local automobile dealers were mentioned in subsection 2, unless it were the intent to exempt them from payment of the tax provided by said subdivision (d). There would be absolutely no point in saving to them a right "to demonstrate," in a statute, such as Chapter 56, which taxes only transportation "for the purpose of selling or offering for sale," unless the purpose were to exempt them from payment of the tax therein imposed.

There is no provision in Chapter 56, which, even in the absence of sub-section 2, subdivision (d), would require a resident dealer of New Mexico to obtain a special permit for the purpose of demonstrating automobiles, which he could theretofore demonstrate without such permit. In other words, if the Legislature had not intended to give the automobile dealer licensed by the State of New Mexico an exemption from payment of the tax levied against appellant, it would have been wholly unnecessary to place subsection 2 of subdivision (d) into the statute.

Carrying the reasoning further: If *subsection 1* of subdivision (d) were removed from the statute, then, even though an automobile bore a New Mexico license, the person transporting it for the purpose of sale would be required to pay the flat fee. Plainly, then, subsection 1 was inserted for the purpose of giving an exemption from the payment of the tax.

By exactly the same reasoning, it is plain to be seen that *subsection 2* was inserted to give automobile dealers, licensed by the State of New Mexico and operating under dealers' licenses, a further and additional exemption, to-wit: the transportation of motor vehicles for the purpose of sale, without securing the special permit and paying the charge therefor, which is required of appellant for like privileges. The exemption could not have been expressed in clearer language, and we submit that the District Court erred in refusing to give such provision the construction contended for by appellant, which would have resulted in declaring the statute invalid as repugnant to the Fourteenth Amendment to the Federal Constitution.

We earnestly contend that by a correct construction of subsection 2 of subdivision (d) of Chapter 56, the New Mexico dealer, under his license and dealers' plates, would be permitted to transport automobiles into, across and out of the State of New Mexico for the purpose of sale, and to carry them both in interstate and intrastate commerce, without payment of the tax required of appellant, thus denying to appellant the equal protection of the laws.

CONTEMPORANEOUS CONSTRUCTION OF THE STATUTE.

While it does not appear in the record, we do not believe appellee will deny that, after the effective date of Chapter 56 (February 21st, 1935), no attempt was made by appellee to collect the tax required by subdivision (d) of Chapter 56 from local dealers. The contemporaneous construction placed upon said statute by appellee, the executive officer in charge of enforcing it, was that it did not apply to local dealers engaged in business in New Mexico.

> "It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration (citing cases); and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States v. Jackson*, 280 U. S. 183, 193.
>
> "The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the government, * * *."
>
> 59 *Corpus Juris*, pages 1025-27.

From the foregoing, we believe it to be established that the District Court, by the entry of its decree, erred in denying to the plaintiff the equal protection of the laws to him guaranteed in the Fourteenth Amendment to the United States Constitution.

POINT IV.

The District Court Erred in Overruling Appellant's Objections to Admission in Evidence of Facts Set Out in Paragraphs XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, XXX, XXXI, XXXII, XXXIV and XXXVII of the Stipulation of Facts, and in Thereafter Adopting Said Stipulated Facts Objected to, as Facts of Its Own Finding. (Specifications of Error Nos. I and VI.)

Paragraph XXI of the stipulated facts pertaining to the status of the used car market of Texas and other states as compared with that in California, is not material to the issues of this cause. Plaintiff's profit cannot affect his constitutional rights.

The distance from the point of purchase to place of resale, specified in paragraph XXII, is likewise immaterial.

The facts in paragraph XXIII and XXIV, relating to condition of appellant's automobiles which are transported, are objectionable, in view of the fact that Chapter 56 does not constitute a police or regulatory statute.

The freight rates for transporting automobiles could not affect the issues of the case. A comparison of the cost to appellant of transporting his automobiles in his chosen manner, all as set out in paragraph XXV is likewise valueless. No issue was raised as to the legality of the methods used by appellant to transport his auto-

mobiles, and no law compels him to use railroad freight transportation far exceeding the cost of transporting the motor vehicles on their own wheels.

Paragraphs XXVI, XXVIII, XXIX, XXX, XXXI, XXXII and XXXIV of the stipulated facts deal with the amount of fees collected by the state, the number of automobiles transported by plaintiff, the total collections of the ports of entry, the expense of operating the same, the area, population and assessed valuation of the property of the State of New Mexico, the appropriation for State Police, the cost of the highways and the revenues of the highway department.

It is appellant's contention that all of these matters, as well as all of the other stipulated facts objected and excepted to, were and are irrelevant and immaterial, improperly admitted in evidence, and made the findings of the District Court, for the following reasons:

1. The statute does not attempt to make a tax compensatory for the use of the highways, for the reasons previously given.

2. The statute is in no sense a police or regulatory measure.

3. The said facts have no bearing upon the question of the repeal of Chapter 56 of the 1935 Session Laws by Chapter 136 of the same Session Laws.

4. The said facts have no bearing on the constitutionality of the statute in question.

POINT V.

The District Court Erred in Making Its Findings of Fact Numbers 2, 3, 4 and 5 Over Appellant's Written Objections and Exceptions Thereto. (Specifications of Error Nos. I and VII.)

The findings here objected to [R. 31], are not founded upon any competent and sufficient evidence adduced at the trial of this cause. They are further objectionable for the reason, heretofore adverted to, that Chapter 56 does not purport to be, and is not in fact, a police measure to regulate the use of the public highways of the state or to promote public safety with relation to traffic thereon.

Finding 2 [R. 31], states that the manner in which plaintiff causes his automobiles to be transported is extraordinary and unusual; that it increases the hazards incurred by the general public and in that manner affects the safety and public welfare, and increases the burden of policing the highways.

The evidence adduced failed to show anything extraordinary, unusual or particularly hazardous in the manner of transporting plaintiff's automobiles. The witness Gonzales, a state police officer, testified that he had never arrested any of the drivers of appellant's caravans, and that in all of the caravans going through the state, he remembered making only two arrests [R. 52-53], although he had been stationed at Las Cruces, where the automobiles enter the state, for about fourteen months. He further testified [R. 52] that possibly twenty-five per

cent of "our time" is consumed in handling and regulating this type (motor caravan) traffic. Yet the very acts which he states consumed the said time are the acts which are required to be performed by the officials at the ports of entry under Sec. 4, Chapter 136.

Nor was there any testimony which showed that the operations of appellant cause any peculiar wear and tear to the highways, as found by Finding No. 3, different from that caused by other pleasure or commercial type automobile traffic. The complaints which this witness makes in his testimony concerning appellant's operations refer to various matters, *none of which are regulated, controlled, or mentioned by Chapter 56.* The said Finding No. 3 further ignores the fact that a large percentage of plaintiff's automobiles are transported over the public highways of the State of New Mexico singly, and without any car being towed thereby [R. 51]. Said finding is further immaterial for the reason, heretofore argued, that the tax laid by Chapter 56 is not based upon compensation for the use of the public highways.

Finding No. 4 is wholly immaterial under the issues joined, since the profit made by appellant cannot affect the constitutionality of Chapter 56, nor the question of its repeal by Chapter 136. Nor is there any evidence in the record to support such finding.

POINT VI.

The District Court Erred in Entering Its Said Decree Upon the Insufficient Findings of Fact Made by It in This Cause.

There are no findings upon which the judgment and decree of the trial court holding Chapter 56 constitutional, can be sustained. Nor are the findings in the case sufficient upon the question of the repeal of Chapter 56 by Chapter 136, to support a decree based upon the fact that such repeal was not effected.

Further, the findings upon which the judgment and decree is based are wholly immaterial, for the reasons heretofore given.

Wherefore, it is respectfully submitted that the decree of the District Court for the District of New Mexico should be reversed and appellant be granted the relief prayed for in his bill of complaint.

Respectfully submitted,

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APPENDIX.

EXHIBIT NO. I.

CHAPTER 56.

AN ACT TO AMEND CHAPTER 139 OF THE SESSION LAWS OF 1933 RELATING TO REGISTRATION FEES FOR MOTOR VEHICLES.

House Bill No. 71; Approved February 21, 1935.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. That Chapter 139 of the Session Laws of 1933, be and the same is hereby amended to read as follows:

"11-321. Registration by non-residents.

"(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first

been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Commissioner of revenue of the State of New Mexico upon application on such form as said Commissioner may prescribe and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. All permits so issued shall be evidenced by certificate, issued by said Commissioner, which shall show upon the face thereof the registration number assigned to each such vehicle, the name and address of the owner thereof, the manner of transportation thereby authorized and a description of the vehicle so registered including the engine number thereof. Such certificate shall be carried at all times by the person in charge of such vehicle or vehicles. A suitable tag or placard shall be issued by the Commissioner with such certificate and shall be at all times displayed on each such vehicle whether the same is being so transported singly or in a caravan. No such permit, certificate, tag or placard shall be used upon or in connection with the transportation of any vehicle other than the one for which the same is issued."

Section 2. That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico that this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this Act shall take effect and be in full force and effect from and after its passage and approval.

EXHIBIT NO. II.

CHAPTER 136.

AN ACT TO CREATE PORTS OF ENTRY TO AID IN THE REGULATION OF THE USE OF THE PUBLIC HIGHWAYS OF THIS STATE BY MOTOR VEHICLES, AND TO AID IN THE COLLECTION OF TAXES AND THE ENFORCEMENT OF STATE AND FEDERAL POLICE AND HEALTH LAWS; CREATING A PORT OF ENTRY BOARD; DEFINING THE POWERS AND DUTIES OF SAID PORT OF ENTRY BOARD AND THE RIGHTS AND DUTIES OF OWNERS AND OPERATORS OF MOTOR VEHICLES; IMPOSING MILEAGE TAXES; PROVIDING PENALTIES FOR THE VIOLATION HEREOF, AND REPEALING ALL ACTS AND PARTS OF ACTS IN CONFLICT HEREWITH.

Senate Committee Substitute for Senate Bill No. 78; Approved February 28, 1935.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. In order to facilitate the enforcement of the laws of this State concerning "motor vehicles", "common motor carriers of property", "common motor carriers of passengers", "contract motor carriers of property", and "contract motor carriers of passengers", upon the "public highways" of this State, as each of said terms is defined by Chapter 154, New Mexico Session Laws of 1933, and to promote the safety and welfare of the public, the preservation and maintenance of the public highways, and the integrity of the regulation of motor carriers, and to more efficiently enforce the payment of registration fees, licenses, mileage taxes, and other charges imposed by law upon motor carriers of passengers for hire and for the transportation of property, and to aid in the collection of other

taxes and the enforcement of other laws, it is hereby declared necessary to provide for the establishment of registration stations or ports of entry into the State of New Mexico upon certain main highways entering the state, through which every motor carrier of passengers for hire or for the transportation of property shall enter the state, register, be inspected, and secure permission and authority to proceed into or across the State upon its public highways.

Section 3. The Port of Entry Board shall designate a sufficient number of main highways entering this State to reasonably meet the needs and requirements of persons operating motor vehicles for the transportation of passengers for hire and for the transportation of property who enter this State from points beyond its boundaries, and shall establish on each of said designated highways a registration office or port of entry where inspection and registration service shall be maintained. The Port of Entry Board is hereby authorized and empowered to appoint such deputies, agents and employees as it deems necessary properly to conduct and manage the affairs of such registration offices and to give service at such registration offices and ports of entry reasonably necessary to meet the needs and requirements of all persons required to register and receive inspection thereat.

The Commissioner of Revenue may in his discretion deputise persons in charge of or employed at ports of entry to act as his agents in the collection of all fees and taxes required by law to be collected by the Bureau of Revenue, and such persons in charge of or employed at ports of entry shall, while engaged in the performance of their duties in enforcing this act and collecting the fees,

licenses and taxes required to be collected by the terms of this act, be considered and held to be the deputies and agents of the departments or official charged with the collection of the same.

Section 4. Every motor carrier who shall transport into this state any property or who shall transport into this state any passengers for hire, by means of the public highways of this State must enter the State on a highway designated as heretofore provided, and shall without delay stop at the registration office or port of entry established on such highway and register, and submit to inspection. The driver of the motor vehicle shall immediately make out and deliver to the inspector at such port of entry a card showing the name of the owner of the vehicle, the name of the operator, or driver, the name of the forwarding or other company in whose service said vehicle is licensed, the license number, the state in which said vehicle has been granted a common or contract motor carrier permit, if any, and number of such permit, the motor number, and the serial number of the vehicle, and a description of such vehicle, whether automobile, truck, trailer, semi-trailer, tractor, motor bus or other type of motor-driven vehicle, the point of origin of the shipment, the ultimate destination of the shipment, the gross weight of vehicle and cargo, and the factory list capacity or the actual capacity if rebuilt, the number of taxable miles to be traveled within the state and the nature, amount and coverage of all public liability or other insurance carried upon said vehicle, and upon the cargo thereon. The driver of said vehicle shall likewise declare upon said registration card, the name and number of the highway or highways which he intends to use within the State and the place where he intends to leave the State. Said card shall

be signed by the operator or driver and filed with the person in charge of said registration station. The driver or operator of said vehicle shall likewise deposit with the person in charge of said registration station or port of entry a full, true and correct copy of his manifest, which shall show the precise nature and character of the cargo and the weight thereof, and shall be certified as a true and correct copy of the original manifest by the issuer thereof.

The person in charge of such registration station or port of entry shall verify the information contained upon said card and manifest, and shall check the license, permit, motor and serial numbers, weight and description of the vehicle. Such person shall likewise inspect said vehicle and ascertain whether the same is in safe and roadworthy condition, properly equipped with all lights, brakes and other appliances required by any statute of this state, in such condition as to be safe for operation upon the public highways of this State.

The person in charge of said port of entry or registration station shall likewise satisfy himself as to the nature and character of the cargo, of the weight thereof, and is authorized to do any and all things necessary to obtain full and complete information in respect thereto, and if in doubt as to the declared weight may order the same weighed before issuing any clearance certificate for such motor vehicle.

The person in charge of said port of entry or registration station shall further inspect the contents of such vehicle to determine whether or not all taxes on gasoline and motor fuel, and excise taxes on alcoholic liquors, and all taxes on any other property have been fully paid.

The person in charge of the said port of entry or registration station shall further inspect such vehicle and its contents to determine whether or not all laws and all rules and regulations of the Departments of this State with respect to public safety, health, welfare and comfort have been fully complied with.

The person in charge of such port of entry or registration station shall further require from the driver or drivers of such vehicles a showing, in such form and in accordance with such rule as may be established by the Port of Entry Board, that the driving of such vehicles within this state shall not be in violation of the provisions of Chapter 61 of the Session Laws of 1933, relating to the hours of service of drivers and chauffeurs.

Section 5. No motor vehicle transporting passengers for hire or transporting property shall be allowed to proceed from a port of entry into the State of New Mexico upon the highways thereof until and unless it has been duly registered and inspected at such point of entry or registration office and a clearance certificate issued therefor.

Section 6. After such registration and inspection clearance certificates or special permits shall be issued for . . .

(e) Motor vehicles not registered or licensed in this state and which are transporting property not for hire, when

(1) All taxes required by the laws of this state upon the contents of such vehicles have been paid and all other laws, and rules and regulations of departments of this state applicable to such contents have been complied with; and

(2) Such motor vehicles have been found by the inspector in charge of such port of entry or registration station to be in a safe and roadworthy condition, duly and properly equipped with all lights, brakes and other equipment and appliances required by the laws of this state, in the interest of the safety and convenience of the public, and

(3) When the mileage tax in Section 8 set forth or the license fee in lieu thereof as in said section provided shall have been fully paid.

Section 7. Clearance certificates shall be issued to all motor vehicles described under subsections (a), (b), and (c) of Section 6; special permits accompanied by clearance certificates shall be issued to motor vehicles described under subsection (d), of Section 6; and a permit accompanied by a clearance certificate shall be issued to all motor vehicles described under subsection (e) of Section 6.

The certificates of clearance and special permits shall show such data as the Port of Entry Board shall prescribe, but in any event the same shall include the serial and motor number of the vehicle together with the license or tag number of such vehicle, the date such certificate is issued, the port of entry at which such certificate issued and destination to which issued and the amount, if any, paid at the time of the issuance of such certificate or special permit.

Such certificates of clearance and special permits shall be in the form of stickers in such size and form as may be prescribed by the Port of Entry Board, so that they can be readily fastened to the windshield of the motor vehicle, and such certificates of clearance and special permits must remain upon the windshield of the motor vehicle

until the trip for which they have been issued has been completed.

The certificates of clearance and special permits provided for in this Act shall be valid only for the specific trip for which the same are issued.

Section 8. . . . There is hereby levied and assessed against motor vehicles described in subsection (e) of Section 6, for the administration of this act and for the maintenance, repair and reconstruction of public highways, a mileage tax, which shall be computed as follows:

(1) Where the gross weight of vehicles and cargo does not exceed fifteen thousand (15,000) pounds, one and one-half (1½) cent per mile from point of entering the state to the point of destination or place of leaving the state;

(2) Where the gross weight of vehicle and cargo exceeds fifteen thousand (15,000) pounds, and does not exceed twenty-five thousand (25,000) pounds, two (2) cents per mile from the point of entering the state to the point of destination or place of leaving the state;

(3) Where the gross weight of vehicle and cargo exceeds twenty-five thousand (25,000) pounds, three (3) cents per mile from point of entering the state to the point of destination or place of leaving the state.

In the event the owner or operator of any motor vehicle described in subsection (e) of Section 6 shall elect to register such vehicle with the Bureau of Revenue and pay the fees required for license plates for said vehicle, then and in such event the owner or operator of such motor vehicle shall be exempt from the payment of said mileage tax.

Section 9. All moneys collected under the provisions of this act by any persons in charge of ports of entry shall forthwith be remitted to the Commissioner of Revenue and by him paid over to the State Treasurer to be by such Treasurer covered into the special suspense fund provided to defray the cost of administering this act.

Section 10. All costs of administration of this act shall be paid from the respective funds for which collections are made by said ports of entry. The proportion of such cost of administration to be borne by each of such funds shall be in the same ratio that the collection for the account of each of such funds bears to the aggregate amount collected by such ports of entry for all of such funds.

The Commissioner of Revenue for the purpose of carrying out the provisions of this act is hereby authorized to create a special suspense fund, with the Treasurer of the State of New Mexico, in sufficient amount to pay the expenses of the administration of this act in conformity with the provisions of this act from the funds benefited through the administration of this act. At the expiration of 6 months after the taking effect of this act, the Commissioner of Revenue shall estimate the amount of funds necessary to carry out the provisions of this act and shall keep an amount available at all times to meet the administrative requirements of the provisions of this act. Any surplus remaining in such special suspense fund shall forthwith be turned into the respective funds of the State of New Mexico to be distributed as provided by law.

At the end of each month the Commissioner of Revenue shall make an accounting of the funds received from the operation of the ports of entry and shall determine therefrom the proportionate charge to each fund.

Section 13. The term "Transportation of Property", as used in this act, shall not only include the transportation of property in or on a motor vehicle, but shall also be construed to include the driving or moving on the public highways of any motor vehicle either under its own power or by being pulled by another motor vehicle where said vehicle or vehicles are to be sold or offered for sale to or by any agent, dealer, purchaser or prospective purchaser.

Section 14. The driving of any motor vehicle into this state for the purpose of transporting passengers for compensation, or transporting property, without the same being first registered and inspected at a registration station or port of entry, and without there being displayed upon the windshield thereof a clearance certificate is hereby prohibited and declared unlawful.

Section 15. Any violation of this act shall constitute a misdemeanor punishable by a fine not exceeding $100.00 or imprisonment not exceeding thirty days or by both such fine and imprisonment. The payment of any fine under the provisions of this act shall not relieve the offender from the payment of any fees or taxes provided by this act or by any other applicable statute of the State of New Mexico or of any other of the provisions of this act, and the vehicle and cargo may be held by the State Cor-

poration Commission, the State Highway Department, the Commissioner of Revenue or any other official authorized to make arrests under the laws of the state, until such fine, special permit fee and costs are paid, and the offending driver may be required by the court imposing such sentence to return to the port of entry through which he should have passed and there comply with all the provisions of this act, with which he should have complied in the first place by the terms hereof. Prosecution for any such violation may be brought in any county in the state in which such driving takes place or in which the driver of such vehicle shall be apprehended.

Section 17. All acts or parts of acts in conflict herewith are hereby repealed.

EXHIBIT NO. III.

CHAPTER 93.

AN ACT AMENDING SECTION 11-331 OF NEW MEXICO STATUTES, ANNOTATED, 1929 COMPILATION AS AMENDED BY SECTION 6, CHAPTER 169 OF THE LAWS OF NEW MEXICO OF 1933 WHICH AMENDED SECTION 6, CHAPTER 77, OF THE LAWS OF NEW MEXICO OF 1931, RELATING TO THE DISPOSITION OF REGISTRATION FEES, COLLECTED UPON THE REGISTRATION OF MOTOR VEHICLES.

House Bill No. 17; Approved February 25, 1935.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. That Section 11-331 of the New Mexico Statutes, Annotated, 1929 Compilation, otherwise known and designated as Section 31 of Chapter 119 of the Laws of 1929 as amended by Section 6 of Chapter 77 of the Laws of 1931 and as further amended by Section 6 of Chapter 169 of the Laws of 1933, be and the same is hereby amended to read as follows:

11-331 Disposition of Fees.

The fees collected under the provisions of this act shall be paid over to the state treasurer not later than the close of the second business day after their receipt. Not to exceed Six per cent thereof shall be covered into the State comptroller motor vehicle fund, and used to defray the expense of the administration and enforcement of this act and the discharge of such other duties as may be imposed upon the department by law. The remainder thereof shall be distributed by the state treasurer on or before

the tenth day of the month next after their receipt, as follows:

Forty-five per cent thereof shall be placed to the credit of the state road fund to be used and disbursed as other moneys in the state road fund,

Fifteen per cent thereof shall be paid to the county treasurers of the several counties in this state and distributed between the respective counties in proportion that the total amount of registration fees paid for motor vehicles in each county bears to the total amount of such registration fees paid for such vehicles owned in the state, to be credited to the county road fund of said respective counties, and used for the improvement and maintenance of the public roads therein, and to pay for the acquisition of rights of way and material pits at the request of any by agreement with the state highway commission.

Fifteen per cent thereof shall be credited to the state general fund.

Twenty-five per cent thereof shall be paid over to the county treasurer of the several counties of this state and distributed between said respective counties in the proportion that the total amount of registration fees paid for vehicles owned in each county bears to the total amount of such registration fees paid for vehicles owned in the state, and the county treasurer of each county shall distribute the moneys paid to him under the provisions of this paragraph, when received, between the county and school district funds of such county and the various cities, towns and villages therein, in the same proportion that the receipts from general property taxes, other than taxes for state purposes, received by said treasurer for the year in which such distribution is to be made, are so distributed

in such county between said county and school district funds and said cities, towns and villages therein. PROVIDED that in the counties wherein are located cities, towns or villages incorporated, organized and operating under special act, the county treasurer of such county shall pay to the treasurers of said cities, towns or villages a proportionate amount of said money, by him to be distributed in the proportion that the receipts from general property taxes in said cities, towns or villages, bear to the total receipts from general property taxes other than taxes for state purposes received by the county treasurers and the collectors of said cities, towns or villages in the year in which said distribution is to be made. And provided further that for the purpose of effecting an equitable distribution in said counties, the collectors of said cities, towns or villages operating under special act shall, on or before the first Monday in October, certify to the county treasurer and to the state tax commission, the assessed valuation and the total tax rate in said cities, towns or villages for such year. The remainder thereof shall be credited to the State Public School Equalization Fund.

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CHARLES ELMORE CR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

HOWARD MORF, doing business under the firm name and style of Pacific Wholesale Automobile Company,
Appellant,

vs.

JOHN D. BINGAMAN, Commissioner of Revenue for the State of New Mexico,
Appellee.

No. 772

BRIEF ON BEHALF OF APPELLEE
With Appendix

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Appellee.

No. 772

BRIEF ON BEHALF OF APPELLEE
With Appendix

APPELLEE'S STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case, but desires to briefly supplement the same.

As appears from the opinion of the Three-Judge Court (R. 32-39) the case at bar was jointly tried with another similar case, the plaintiff in the other case being a party by the name of Piper who resided in Dallas, Texas, and conducted his business generally in the same manner as the appellant Morf. In both cases stipulations of ultimate facts were entered into between the parties. In the Piper case Piper testified as to the manner of conducting his business, and in the case at bar the appellant Morf testified to the manner of conducting his business, while the testimony of the witness Gonzales was offered in both cases. In due course after the hearing, the Court rendered its opinion (R. 32-39).

Thereafter, judgment was entered in the case at bar, dismissing the complaint, and damages were assessed in the sum of $4,825.00 against the appellant and his surety upon the several injunction bonds given by the appellant, as of the 18th day of December, 1935, with interest thereon at the rate of six per cent per annum from the said 18th day of December, 1935, until paid, and for costs of the action to be taxed.

From this judgment of dismissal and judgment assessing damages, an appeal was prayed by the appellant and allowed in due course. Probable jurisdiction having been noted, the case is now before this court for final disposition.

APPELLEE'S STATEMENT OF THE FACTS

Appellee accepts the statement of facts contained in appellant's brief, with certain additions and corrections as hereinafter stated.

At page 5, counsel for appellant state that appellant's cars enter the state of New Mexico at the City of Las Cruces and leave the state at Lordsburg. Reference to paragraph 9 of the stipulation of facts (R. 44) shows that the cars enter New Mexico at the town of Anthony and leave the state at Steins, traveling approximately 166 miles in New Mexico.

The amount of damages fixed in the judgment of $4,825.00 represents the accumulated fees under the caravan act from August 23, 1935, the date of the filing of the bill of complaint, to December 18, 1935, the date to which the damages were computed, and, on the basis of an average fee charge of $6.25 for each car (the act providing for a charge of $7.50 on the lead car and $5.00 on the towed car and a fee of $7.50 where the cars are driven singly), indicates that in a period of approximately four months, the appellant caravanned through New Mexico 772 cars. Between March 6, 1935 and August 23, 1935, the appellant paid to the State of New Mexico, for cars caravanned, the sum of $4,418.75, which, computed on the same basis, would indicate the movement by him of 707 cars in four and one half months.

Appellant's manner of conducting his business is set forth in detail (R. 50 to 52 incl.), and also in the opinion of the Court (R. 33-34). Summarizing appellant's method of doing business, it appears the appellant is engaged in the automobile business in the City of Los Angeles, California. He purchases second-hand passenger automobiles in states lying to the east of New Mexico and drives them over the highways to California for sale, entering the State of New Mexico at Anthony and leaving it at Steins, New Mexico. Approximately 80 per cent of the second-hand cars are models of the years 1934 and 1935. None of these cars exceed 5,000 pounds in weight. All of such cars are driven through New Mexico in caravans or groups. From 75 to 80 per cent of the cars so driven are coupled together with a lead car and one tow car. The remaining 20 to 25 per cent of the cars are driven singly (that is, each car has an individual driver), but all of such singly driven cars are moved in groups or caravans.

In every caravan there are three or four persons hired by appellant who make it a business of driving caravan automobiles, and the remaining drivers are people who happen to be in the East and desire to return to California by driving a car for the appellant. The appellant pays to these drivers, who are not regular employees, in some instances, a dollar a day and expenses, and in some instances, two dollars a day. His regular drivers are sent from Los Angeles, California, to Dallas, Texas, the appellant paying them nothing for the trip except their expenses.

When two cars are coupled together, there is no connection between the braking systems of the lead car and the towed car (Paragraph 10 of the Stipulation, R-33),

The witness Fidel Gonzales testified (R. 52): That he is a member of the New Mexico State Police, located at Las Cruces; that he did not know Mr. Morf but was familiar with the type of operation of cars through New Mexico known as the auto caravan; this type of operation increased the duties of the police 25 per cent in handling and regulating the same; traffic accidents have increased since the caravaning of automobiles was begun; they drive too close together, making it difficult for others to pass, and they

do not keep their lights in shape; that he had warned drivers many times, but had never arrested any of them; that they carry no side mirrors (rear vision mirrors) on the caravan cars (Paragraph 24 of the Stipulation, R-46).

The witness further testified that when two cars are towed together he noticed that when they go around the curve, the back car skids; this applies to the appellant's cars; sometimes the whole caravan stops when car trouble develops; the State Police inspect these caravans for stolen cars, try to get their registration numbers, check their lights, motor number and serial number; the drivers are sometimes women, sometimes men, and sometimes boys; a few of the drivers, in making over-night stops, stop at tourist camps, and the rest sleep in the cars; that sometimes when stopping the drivers, they say "they are tickled to death to get some sleep." That the front wheels of the towed car are free; he had seen some of the appellant's hook-ups skid around the curve and that he had warned the men. It also appears (Paragraph 23 of the Stipulation R-46) that the motive power and brakes on the lead car were originally designed to propel or restrain only one vehicle.

MATERIAL STATUTORY PROVISIONS

In view of the fact that counsel for the appellant, under their Point I attempt to set up a "History and Discussion of New Mexico Statutes Involved," and in view of the fact that the statutes directly involved are statutes in fact inter-related with other statutes, we have included in an appendix copies of certain other statutes of the State of New Mexico not referred to by appellant, the several statutes being designated Appendix "A" to Appendix "M" inclusive, appellee's Appendix "A" being the entire statute a portion of which is set out as appellant's Exhibit No. I; appellee's Appendix "B" being the entire statute which is set out in part in appellant's Exhibit No. II; appellee's Appendix "C" being appellant's Exhibit No. III, and the remaining appendices covering additional statutory references which counsel for the appellee consider pertinent.

SUMMARY OF APPELLEE'S ARGUMENT

I.

CHAPTER 56, LAWS 1935, IS NOT REPEALED BY CHAPTER 136, LAWS 1935, BUT THE TWO ACTS ARE COMPLIMENTARY.

There is no specific repeal of the earlier act in the later act. The two acts were passed at the same session of the legislature from which it follows that the presumption is most strongly against implied repeal. The two acts must be construed in pari materia. Analysis of the two acts shows conclusively that there is no repugnancy between the provisions of the two acts. Every part of each act can be given full effect without any conflict.

The terms of the two acts are so plain that no construction is necessary.

II.

CHAPTER 56, LAWS 1935, DOES NOT CONFLICT WITH THE COMMERCE CLAUSE OF SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

The Act does not lay a tax on the privilege of engaging in Interstate Commerce. The classification which it makes rests upon the natural basis of those who use the highways for the purpose of private gain, and move vehicles over the highways in integrated groups commonly known as "Caravans". The Act contains the necessary requirements or indicia to make it valid as imposing a charge for the use of the highways and for highway regulation. The fact that the charge is a flat sum is not material. Practically all of the proceeds of the fees are devoted to highway construction and regulation. The amount of the exaction is reasonable.

III.

CHAPTER 56, LAWS 1935, DOES NOT DENY TO THE APPELLANT THE EQUAL PROTECTION OF THE LAWS AND, THEREFORE, DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

The classification is based upon natural and logical grounds. There is no discrimination made between residents and non-residents, or between resident automobile dealers and non-resident automobile dealers. A resident automobile dealer desiring to caravan in intra-state or interstate commerce must comply with Chapter 56, Laws 1935, to the same extent as appellant.

Under the provisions of Chapter 56, Laws of 1935, the appellant has the optional right to pay the regular registration fees for license plates, and thereby escape the payment of the caravan fees, or, in the alternative, to pay the caravan fees without taking out regular license plates under the general registration laws.

IV.

APPELLANT IS NOT IN A POSITION TO URGE THE UNCONSTITUTIONALITY OF CHAPTER 56, LAWS OF 1935.

Other laws which appellant does not attack, chiefly Chapter 169, Laws of 1933, would require appellant to pay, in order to caravan, the regular license plate registration fees required of residents of the State. Chapter 56, the only law the appellant attacks, provides certain exemptions from the registration requirements of Chapter 169, including the right to caravan by payment of the caravan permit fees which are normally much lower than the fees required by Chapter 169. Thus the law which appellant attacks gives him more favorable position than the law which he does not attack.

V.

APPELLEE'S ANSWER TO APPELLANT'S POINTS IV, V AND VI.

The objections to the stipulated facts, findings of fact made by the Court and the decree entered thereon, do not present any questions for review here.

I.

APPELLEE'S REPLY TO APPELLANT'S POINT I.

On pages 13 and 14 of appellant's brief is a discussion of certain New Mexico statutes involved in the case. Appellee will answer the argument on these pages and will refer to other statutes bearing on the questions at issue in our answer to appellant's Point II.

THERE IS NO IMPLIED REPEAL OF CHAPTER 56 OF THE SESSION LAWS OF 1935 BY CHAPTER 136 OF THE SESSION LAWS OF 1935.

Reading Chapter 136, Session Laws of 1935 (Appendix "B"), it is apparent that such Act is primarily a police measure and is almost entirely adjective law. In substance it sets up machinery by the means of which the state may attain greater efficiency in the administration of its various laws designed to promote safety in the use of the highways and greater efficiency in and uniform application of its laws and taxes to highway users, particularly those engaged in interstate commerce. It contains no substantive law defining any duties of those who use the highways except that they are required to submit themselves to certain inspections of their equipment and cargo and, in some cases to pay certain fees to defray the cost of the administration of the Act and for the maintenance and construction of the highways. Obviously the expense to the state of maintaining this somewhat elaborate system is substantial. The record in these cases shows that the expense of administration has already consumed about 50 per cent of the collections made. The Act provides that

such expense shall be ultimately prorated and charged against the respective funds benefitted.

The mileage tax imposed by the Act applies only to motor vehicles not registered in the State of New Mexico, and is assessed against only two classes of such non-residents, (a) those transporting passengers or property for hire and (b) those transporting property not for hire. Chapter 56, Session Laws of 1935 (Appendix "A"), classifies and exempts from registration only limited groups from whom the mileage tax revenue would be obviously small. That portion of the stated purpose of the Act, which, in addition to defraying the cost of administration, provides for the use of the funds for highway purposes was apparently inserted to dispose of any residue after the payment of such expenses. Chapter 136 is replete with references to other statutes and is obviously intended to be supplemental and auxiliary to the body of the state law then in existence. At no place in the chapter is there any specific repeal of or amendment to any other statute. If paragraph (d) of Chapter 56 is repealed it is repealed by implication.

The rule is against implied repeal unless an irreconcilable repugnancy exists. The two statutes must be so construed, if possible, to give full force and effect to both. Statutes must be so construed as to sustain their constitutionality. The burden is upon appellant to show that such acts are in fact repugnant. The statutes have not been construed by the state courts of New Mexico. If, under any reasonable construction, the two acts may be reconciled, it is the duty of the court to adopt such construction. Both Chapter 56 and Chapter 136 were enacted during the same session of the legislature.

It is the contention of appellee that both acts are wholly consistent and in harmony with each other. Appellant contends that the transportation of property as defined in Section 13, Chapter 136 (Port of Entry Act) includes the purpose for which his vehicles are operated. This, appellee concedes. Appellant contends that since such vehicles are not registered or licensed in this state and are transporting property not for hire they come within the class defined in paragraph (e) of Section 6 of said Port of Entry Act. This, appellee also concedes. Appellant

then contends that his vehicles are therefore amenable to the second portion (unlettered) of Section 8 of said Port of Entry Act, which imposes a special tax for the use of the state's highways; that his vehicles fall in the class set out in sub-paragraph (1) of said portion, being of less than 15,000 pounds gross weight; and should pay in advance at such ports of entry when entering the state a tax of one and one-half cents per mile for each mile they are to be operated over the state's highways. All this appellee concedes and asserts.

The appellant concedes that by payment of the regular license plate fees he may, pursuant to the last paragraph of Section 8 of said Chapter 136, be relieved of the payment of the mileage taxes above mentioned but that such relief is not obtained by the payment of the "special permit" or "caravan fee" provided in sub-paragraph 3 of paragraph (d) of said Chapter 56. He concedes that unless said paragraph (d) of said Chapter 56 has been repealed by Chapter 136, if he fails to pay the regular license plate registration fees he would be obliged to pay both the mileage tax and the special permit or caravan fee. That is the position of appellee. Appellant contends, however, that, for some reason not quite clear to appellee, the fact that Chapter 136 extended the right to avoid payment of the mileage tax by payment of the license plate fee without extending that privilege on payment of the special permit fee in paragraph (d) of Chapter 56, evidenced the intention of the legislature to repeal said paragraph (d) of Chapter 56. This, appellee cannot concede.

Because, under certain circumstances, appellant might escape payment of the said mileage tax, it does not follow that by the payment of the mileage tax he may escape payment of any registration, license, caravan or any other fee. The privilege conferred upon him to escape the mileage tax by payment of the fee does not, by any means, carry with it the right to escape the fee by payment of the mileage tax.

The general rule is that all motor vehicles operated over the highways of the state should be registered and should pay the regular license plate fees. If appellant or any others are exempt from such fees they must rely, for such exemption, upon the provisions of the said Chapter

56 and not upon any provisions of the Port of Entry Act, said Chapter 136.

Paragraphs (a), (b) and (c) of said Chapter 56 should be read in connection with this issue. They permit certain vehicles owned and operated by non-residents to enter the state without payment of any registration fee. Many vehicles included within the class defined in paragraph (e) of Section 6 of Chapter 136, are so exempted from registration, and payment of license plates fees. The purpose of Section 8 of Chapter 136, (the Port of Entry Act) was to exact from such vehicles engaged in the transportation of property not for hire, the payment of the nominal mileage taxes there assessed.

However, the first sentence of paragraph (a) of Chapter 56 extends such exemptions from registration to non-resident owners "*except as otherwise provided in this section.*" Paragraph (d) is a part of the same section, pertains to caravan operations and therefore provides otherwise than the limited exemptions in paragraphs (a), (b) and (c) of said chapter. *Obviously,* caravanned cars are not, by the first three paragraphs of Chapter 56, exempted from registration but are treated separately, definitely and specifically by paragraph (d) of said chapter.

Special attention is called to the fact that paragraph (d) is stated in the alternative. One driving automobiles over the highways may either (1) register his cars under the general registration statutes in the same manner as any other citizen, pay the fees therefore, for which he receives a set of license plates, or (2) he may apply for a special caravan permit and pay the fees therefor, for which he receives a certificate and a suitable tag or placard, or (3) if he is a dealer licensed by the state and owns the cars and wishes to demonstrate them, he may drive them over the highways for that purpose and may offer them for sale in conjunction with such demonstration by the mere use of his dealer plates.

The cost of license plates for some vehicles is materially greater than the caravan fees imposed by subparagraph 3 of paragraph (d). (See Sec. 9, Chapter 169, Session Laws of 1933, Appendix "J".). For some vehicles this cost is less than such caravan fees, dependent

upon the weight and age of the cars in question and the quarter of the year during which licensed. (Appendices "K" and "J"). By the terms of paragraph (d), Chapter 56, appellant may elect to either buy license plates or pay caravan fees, it being presumed that he would take whichever course is the cheaper. The intent of both Chapter 56 and Chapter 136, read together, is not only to require appellant to pay for the use of the highways, but also to protect him from any obligation to pay any sum greater than that exacted of a resident of New Mexico for the privilege of general highway use.

Under a proper interpretation of both acts appellant is required to pay both a caravan fee as set out in sub-paragraph 3 of paragraph (d) of Chapter 56, (Appendix "A"), and a mileage tax as set out in Section 8 of Chapter 136 (Appendix "B"). However, if he should elect to pay the regular registration fees and obtain license plates, pursuant to the provisions of sub-paragraph 1 of paragraph (d) of Chapter 56, the effect of the last paragraph of Section 8 of Chapter 136 is to relieve him of the mileage tax.

This, and nothing more, is the intention of these paragraphs. The effect of this interpretation is to provide that caravaners, such as appellant, shall pay the same fees for the use of New Mexico highways as do residents of the state, provided that they shall not, under any circumstances, be required to pay any more than $7.50 or $5.00 per car plus the mileage tax in Chapter 136 provided.

This interpretation of the two acts is wholly reasonable and logical, gives full force and effect to every provision of both chapters and avoids any mandatory judicial finding of unconstitutionality in either of them. The reasonableness and effect of the mileage tax, considered separately or as combined with the caravan fee, is not in issue because not raised by appellant. The mere fact that the effect of sub-paragraph 3 of paragraph (d) of Chapter 56 results in the imposition of two kinds of tax as compared with only one kind under sub-paragraph 1 of said paragraph (d) has no bearing on the validity of the charge or charges.

Appellant's argument on pages 16 and 17 of his brief, to the effect that the legislature enacted part of Chapter 136 to replace Chapter 56 because it realized the latter act

was unconstitutional, besides being wholly a product of appellant's imagination and without any foundation of fact, most distinctly begs the question. Whether Chapter 56 is constitutional must be considered altogether apart from the proposition of its implied repeal by Chapter 136. If it is valid of itself it is not rendered invalid by the additional mileage tax imposed by Chapter 136. *Interstate Busses Corp v. Blodgett,* 276 U. S. 245. So assuredly the fact that the legislature imposes a second tax does not indicate as a matter of law any lack of faith in the validity of the first.

The vice in appellant's position is most clearly shown by his deduction based upon his analysis of the provisions of Chapter 136 (the Port of Entry Act) in the first paragraph on page 18 of his brief. Appellant states that Chapter 136 grants an operator subject thereto the option of paying the mileage tax or of paying the fees required for regular license plates under the general registration and license law. Appellant further points out that the caravan permit fees which he is attacking are not included within the description of such general license plate registration fees; that is, that the caravan permit fees are not fees as to which there exists the option of payment authorized by Chapter 136. With that analysis appellee agrees; the act plainly so provides.

But appellant's reasoning based upon the foregoing is plainly erroneous. The rule "expressio unius est exclusio alterius" does not apply because we are here considering two acts (Chapters 136 and 56) which are plainly complementary.

Such rule likewise cannot be invoked as evidence of an implied repeal; rather, the omission of mention of the caravan permit fees in the later act (Chapter 136) shows a legislative intent *not* to include them in the "options" authorized therein.

CHAPTERS 136 AND 56 ARE COMPLEMENTARY, NOT REPUGNANT.

Under Chapter 136 appellant is required to pay a mileage tax which, at his election, he may avoid by the payment of the regular license plate registration fee in lieu

thereof. Under Chapter 56 he can elect to pay either such regular license plate registration fee or the caravan permit fee. Both give him the right to pay the regular license plate registration fee and no more; there is no conflict in that respect. Both, read together, require him to pay the mileage tax and the caravan permit fee, on failure to pay the license plate registration fee; there is no conflict in that respect.

A rule exists which is far superior in effect to the principle of implied repeal. This is the rule that acts passed at the same legislative session are to be construed *in pari materia*. *McMaster v. Gould*, 239 N. Y. 606, 147 N. E. 214; 25 Ruling Case Law, p. 930, Sec. 180. 59 Corpus Juris 928, 1053. Here are two acts which create no awkwardness of construction whatsoever: when their terms are familiar they are not even open to construction. No administrative or judicial rulings are necessary to enable one understanding the English language to ascertain exactly what is the effect of both acts.

Chapter 136 does not cover the field of Chapter 56. It does not attempt to relieve those subject thereto of the caravan permit fees required by Chapter 56. Rather, by Section 13 of Chapter 136, the classification originally created by Chapter 56 is by definition made subject to the requirements of Chapter 136.

In support of this proposition we cite upon the question of implied repeal the following cases:

Wood v. U. S., 16 Peters 342
McCormick v. Brown, 286 U. S. 131
U. S. v. Lee Yen Tai, 185 U. S. 213
Graham v. Goodcell, 282 U. S. 409

The rule is recognized in New Mexico.

James v. County Commissioners, 24 N. M., 509, at page 513; 174 P. 1001.

Where the two statutes are practically contemporaneous statutes, passed at the same session of the legislature, the presumption against implied repeal is still stronger.

There is another axiom of statutory construction which should be borne in mind at this point, namely: that a statute must be construed, if possible, so as to avoid holding it unconstitutional.

Fox v. Washington, 236 U. S. 273.
Beander v. Barnett, 255 U. S. 224
Panama Ry. Co. v. Johnson, 264 U. S. 375
Linder v. U. S. 268 U. S. 5

II.

APPELLEE'S ANSWER TO APPELLANT'S POINT II.

On page 20 and the first half of 21 of Appellant's brief he urges that the caravan permit fee levied by Chapter 56 is a tax directly upon the vehicle, that is, upon a subject of interstate commerce. He bases this claim upon the proposition that if motor vehicles are transported upon their own wheels, for any purpose other than sale, the caravan permit fee does not apply to them. He claims, therefore, that the fee is not a fee for the use of the highway, but rather upon the purpose of the transportation, that is, sale.

A brief analysis easily demonstrates the error in Appellant's contention at this point. There are several complete answers.

Appellant admits, at the top of page 34, that " a proper tax classification of vehicles moving in integrated groups or fleets might be proper," but urges that Chapter 56 does not accomplish such classification. In this appellant is clearly mistaken. The record shows that there existed and exists a practice of moving motor vehicles on their own wheels over the public highways in order to take them to the place of sale. The record further shows that the regular practice was and is to move these cars in integrated groups or fleets, for practical purposes described as *"caravans."* Seventy-five to eighty per cent of the cars in such caravans are joined in tandem, or two-car "hookups," the two cars being moved by one driver in the lead car, such second car being towed by the lead car. Although the re-

maining twenty to twenty-five per cent of such cars may be driven singly, the record shows that they are handled as a part of the integrated group or fleet under the control or management of the caravan manager. (R-44 and 51). By reason of this manner of operation and the type of drivers employed traffic hazards were increased, an extra burden was thrown upon traffic officers, and other abuses grew. The legislature sought to enact a measure to meet this situation. The class to be the subject of this legislation must be properly defined to create a valid classification. The record in the trial of this case attests the validity of the classification. The record shows that Appellant caravans his cars across the state in accordance with the general practice, that is in groups or integrated fleets, with seventy-five to eighty per cent of the cars in tandem. (R-44-51.) The record fails to show that either the appellant or others move such cars over the highways of the state in any manner other than that described above. There is no evidence in the record that cars are moved on their own wheels upon the highway in a similar manner for any other purpose than for sale.

So when the legislature desired to enact a law to meet this fact situation it is plain that the definition of the class which it adopted plainly defines the class against which the law is directed, and that the class included in the legislative description does not, in fact, include any other motor vehicle movement except the integrated fleet movement above described.

Where an act of the legislature creates a class which the actual facts show to comprise those subject validly to classification, that such fact does not appear in the statute is no objection to it. Whether a statute validly classifies is largely a question of practical fact. That is, "we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience."

Patsone v. Pennsylvania 232 U. S. 136
Williams v. Baltimore, 289 U. S. 36
Central Lumber Co. v. So. Dakota 226 U. S. 157
O'Gorman & Young v. Hartford Fire Insurance Co. 282 U. S. 251
Corporation Commission v. Lowe, 281 U. S. 431

Appellant complains of the segregation of those engaged in caravaning into a separate class, alleging that it is improper and therefore deprives him of equal protection of the laws. Analyzing the basis for the class we find two fundamental requirements, to-wit: 1. Motor vehicles being moved for purpose of sale, and 2. Those being moved for that purpose on their own wheels.

The first limitation of the class is amply justified by the familiar rule that "the highways of the state are public property, their primary and preferred use is for private purposes; and their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit." *Stephenson v. Binford,* 287 U. S. 251. Public highways are used by all manner of motor vehicles for many different purposes. The segregation of those being moved over the roads for the purpose of sale properly and effectively separates those vehicles using the highways for purposes of gain, from that great class of vehicles of identical kind and character but which are making a private use of the roads, a use of public highways for which such highways are primarily intended. Certainly one who makes a business of moving vehicles over the public highways in order to move them where they may be sold, does so for the purpose of gain. Since the vehicles included within the class defined as caravans (those making a use of the public highways for purpose of gain), are by the terms of the definition properly segregated from other vehicles using the highways for private purposes, the second limitation in the definition, to-wit the movement of the vehicles on their own wheels, rests upon a natural, physical attribute of the business. Motor vehicles included within the defined class in question are both the subjects of commerce and the instrumentalities of conducting the commerce. That an automobile being

moved for the purpose of sale is merchandise is a conclusion which is not subject to question. The mere fact that the merchandise itself is the instrumentality through which its movement is accomplished does not endow it with specific immunity from the application of the general principles of law. An automobile which is using the public highways to move itself or a towed vehicle is making no less use of the public highways than if it were used to transport other merchandise or persons for gain. Yet the record shows characteristics in the nature of such movement which are peculiar to transportation of such automobiles as distinguished from other freight. Automobiles being so transported for purpose of gain, being properly segregated from automobiles making a private use of the public highway, are, as shown by the record, proper subjects for separate classification by reason of the peculiarities of the methods used in such movement, and the additional burdens imposed upon the highways and the policing of the same.

CHAPTER 56 IMPOSES A VALID CHARGE.

Commencing in the middle of page 21 of his brief, appellant discusses the subject of the requirements of a valid motor vehicle tax for the use of highways in interstate commerce. On page 23 appellant cites most of the relevant cases on that subject.

We particularly desire to call to the Court's attention, at this point, that in the following four cases this Court sustained the validity of state motor vehicle license fee laws, which imposed upon interstate motor vehicle operators a flat tax not varying with the mileage travelled, and which was required for even one trip per year through the state.

Hendrick vs. Maryland, 235 U. S. 610
Kane vs. New Jersey, 242 U. S. 160
Hicklin vs. Coney, 290 U. S. 169
Aero Mayflower Transit Co. vs. Georgia Public Serv. Commission, 295 U. S. 285

Commencing with page 24, appellant adduces figures to support his claim that the caravan permit fee is not compensatory. Appellant for his own special convenience desires to travel 166 miles through the state. He, therefore, concludes that the mileage rate, which he arrives at by dividing the distance which he travels into the fee fixed under the caravan act, is excessive and discriminatory when compared with the mileage fees set forth on pages 24 and 25 of appellant's brief.

The fallacy of this argument is apparent. The caravan act is a general act applying all over the state and to all who pass throught the state, regardless of the distance travelled. By way of illustration, if the appellant had elected to enter the state of New Mexico at the Raton gateway on the north boundary of the state, with ultimate destination in California, he would travel over U. S. Highways 85 and 66, leaving the state at the Gallup gateway, necessarily travelling some 430 miles. If he elected to enter the State of New Mexico through the Raton gateway, with ultimate destination, El Paso, Texas, he would travel over U. S. Highway 85, and necessarily travel some 500 miles. Again, if he entered New Mexico at the Texaco gateway, with destination California, crossing the state from East to West, he would necessarily travel some 400 miles.

Again the fallacy of appellant's argument is apparent from a mere reading of the act which does not limit the use of the caravan permit either by way of mileage travelled, route travelled, or the number of times he may enter and leave the state under the same permit, so long as the car is being transported for sale. In other words, if the appellant drove his car to California and found no market for the same in California, he has a perfect right, under the caravan permit act, to return through New Mexico or into New Mexico with the car, without paying any additional permit fee.

Therefore, the comparisons which appellant makes on pages 24, 25 and 26 of his brief, are not applicable.

> "The appellant urges the objection that its use of roads in Georgia is less than that by other car-

riers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. Cf. Clark v. Poor, supra; Hicklin v. Coney, supra. One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."

Aero Mayflower Transit Co. v. Georgia Public Serv. Com'n. 295 U. S. 285.

Another patent defect in appellant's reasoning at this point is shown by the following: Appellant is in a well-defined class, which in the manner of its use of the highways by caravan motor vehicles is clearly distinct from any other class of highway users. (See our introductory argument under this point, supra.) Being in a separate classification, appellant can be required to pay other and different license fees than others in different classes are required to pay.

Bekins Van Lines vs. Riley, 280 U. S. 80.

Commencing with page 26 of his brief, appellant cites, quotes and places great reliance upon *Interstate Transit Co. vs. Lindsey,* 283 U. S. 183, and *Sprout vs. South Bend,* 277 U. S. 163. He also cites *Prouty vs. Coyne,* 55 Fed. (2nd) 289.

An analysis of the two cases chiefly relied upon reveals that the holdings therein upon which appellant leans for support are not applicable to the case at bar.

Taking first *Interstate Transit Co. vs. Lindsey.* A complete body of motor vehicle law existed in Tennessee, including license fee exactions, but the law held invalid was not among these. Rather it was one item of a voluminous general privilege tax law applying to over 100 different types of businesses (practically every kind of business in the state); that is, it was a part of the large general body

of revenue law of the State rather than a part of the motor vehicle license fee laws. This Court held the foregoing to be enough to invalidate the law, saying this indicated an intention not to require compensation for use of the highways, but simply an intention to tax the business of interstate commerce by motor vehicles along with every other business. Then the Court goes on to point out that the tax there in question, besides the infirmity just stated, did not contain any provision indicating the intent of the legislature that the law in question imposed a tax as compensation for the use of the highways. Thus the Court points out that the proceeds are not devoted in any part to highway maintenance, and that the tax was not graduated in proportion to the use made of the highways (the tax involved license fees up to $750.00 per year). As we read that case, the Court held the law invalid because it did not contain even one of the indicia of laws which have been sustained by this Court even prior to *Hendrick vs. Maryland*, cited supra, upon the theory that the state is entitled to compensation for the use of facilities provided by the state. With all deference, we believe that such license tax in *Interstate Transit Co. vs. Lindsey*, would have been sustained by this Court had it contained any one of such indicia. In other words, in the two cases relied upon by the appellant, there is not a single one of the indicia that the tax was exacted as compensation for the use of the highways.

An analysis of *Interstate Transit Co. vs. Lindsey*, substantially similar to the foregoing, is contained in *Consolidated Freight Lines vs. Pfost*. 7 Fed. Supp. 629, at 633, a three-judge case in the District Court of Idaho.

In *Sprout vs. South Bend*, supra, there was involved a city ordinance imposing a $100 license fee upon interstate busses. The fee was plainly too large to be sustained purely as a police power measure. The proceeds were not devoted in any part to highway maintenance or consfruction, and it was not graduated in proportion to the use. Thus again the Court dealt with a law containing not one of the indicia of a law imposing a charge for the use of facilities furnished by the state to an interstate operator.

Now compare the case involved in those two cases with

the law in question here. In the first place, the caravan license law is a part of the general motor vehicle registration and licensing laws of the State of New Mexico, and the act itself declares that the permit is issued and the fee exacted for the use of the highways. This is conceded at the bottom of page 13 of appellant's brief and clearly appears from the act and the New Mexico statutes set out in the appendix hereto. Thus one of the indicia, and one which the Court first remarks upon and which it emphasizes as being absent in *Interstate Transit Co. vs. Lindsey,* supra, is present in our case. In the second place, practically all of the proceeds of the caravan permit fees are directly allocated by law to the enforcement of the act and to highway construction, maintenance and traffic regulation, and the balance is devoted indirectly to these purposes. This feature will be discussed more fully later herein. So at this point the caravan permit fee law is found to contain two of the indicia lacking in the cases upon which appellant relies. In the third place, while the permit fees here involved are not graduated according to the use made of the highways, nevertheless, they are small in amount and by appellant's own analysis, are not excessive. In any event, the law pertaining to this third feature is clearly governed by *Hendrick vs. Maryland,* cited supra, *Kane vs. New Jersey,* cited supra, *Hicklin vs. Coney,* cited supra and *Aero Mayflower Transit Co. vs. Georgia Public Service Com'n.* which we have cited and quoted from above.

At this point we desire to repeat part of a quotation from *Interstate Transit Co. vs. Lindsey,* supra, which appears in the middle of page 27 of appellant's brief. This quotation summarizes the indicia above referred to, and, it is to be noted, states them in the alternative:—

> "As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. vs. Blodgett, 276 U. S. 245), *or*

by the express allocation of the proceeds of the tax to highway purposes as in *Clark vs. Poor,* 274 U. S. 554, supra, *or* otherwise. (Italics ours).

Appellant cites, but does not appear to rely much upon *Prouty vs. Coyne,* 55 Fed (2nd) 289. This case is criticized in *Consolidated Freight Lines vs. Pfost,* supra. It is there pointed out that the Court in *Prouty vs. Coyne,* misconstrued *Interstate Transit Co. vs. Lindsey,* and we submit that a reading of the Prouty case will so disclose. Furthermore, in the Prouty case extremely large license fees, up to more than $500.00, were required for single trips through the state.

There is a further vice in appellant's reasoning based upon these three above cases upon which he particularly relies. In each of those cases the fees held invalid as to interstate motor vehicle operators were compared by the Courts with fees charged intra-state operators in exactly the same class as the interstate operators. Such cases, therefore, do not support appellant's argument since he compares the caravan fees charged him with fees exacted from others in a totally different class.

PROPER COMPARISON OF TAX CHARGED CARAVANS WITH TAXES CHARGED OTHER CLASSES DOES NOT INDICATE CARAVAN TAX IS NOT A ROAD USE TAX.

Appellant contends (pages 24-29) that the caravan fee is not compensatory, is therefore a direct charge upon the privilege of engaging in interstate commerce or upon the subjects of interstate commerce, and not a road use charge; and attempts to prove his contention by a claim that those who caravan, as a class, pay fees greatly in excess of fees paid by other classes of highway users. The argument is apparently advanced, not to prove discrimination, but as evidence to identify the character of the caravan tax. In this argument appellant wanders far afield from the proper sphere of judicial inquiry. Without, in any way, conceding the propriety of appellant's contention, it is submitted that his entire argument, although im-

proper, falls because it is based on a false premise and the conclusion is entirely erroneous.

A glance at Chapter 136 shows that it was written with due regard to the provisions of many other statutes. Both Chapter 56 (Appendix "A") and Chapter 169 (Appendix "J") were obviously considered. Chapter 169 requires the registration of all vehicles. Chapter 56 contains certain exemptions, and, being in derogation of the general rule, must be construed strictly against one who claims the exemption.

Camas Stages vs. Kozer, 209 P. 95 (Ore.).

Paragraph (b) of Section 1 of Chapter 56 limits paragraph (a) of the same section by requiring the registration of all vehicles transporting property for compensation or transporting merchandise, except those engaged in caravaning, who are separately treated in paragraph (d) of the same section and except the limited class defined in the same paragraph (b) as those vehicles "used exclusively in the transportation of livestock, lumber, farm or dairy products, from the place of production to market, or in the transportation of a return load" of the same commodities. This treatment of this latter class indicates a legislative intent to favor such a class which the legislature had a perfect right to do, *Aero Mayflower Transit Co. vs. Georgia Public Service Com'n.* supra, and discrepancy in fee charges to this class certainly cannot be used as descriptive of the legislature's ideas of the value of road use.

Reading Chapter 169, Chapter 56 and Chapter 136 together it will be observed that, aside from pleasure cars transporting passengers not for hire and aside from such other vehicles as transport property not included in the broad term of "merchandise," if any such exists, and which is not being so transported for hire, the only class of highway users other than caravaners which is exempted from the payment of the regular registration license plate fee is the above described class of agricultural users. All those using the highways to move property for compensation and all those using them to transport merchandise, as does the appellant, must pay the registration fee provided

in Chapter 169. Such other classes of users are not in fact given as great latitude as is appellant because they must pay the registration fee while appellant is given the option to pay the mileage tax and the caravan fee *or* to pay the registration fee. Appellant in referring to tax charges against a 25,000 pound truck has compared a combination of mileage tax and caravan fee, as paid by him, with only the mileage tax, when he should have compared his charges with only the registration fees as paid by such other classes.

Appellant cannot contend that he is not engaged in transporting merchandise. If his cars are not intended for sale they are not within the class. A fair comparison of charges implies some fair basis of comparison. Charges against appellant, if they are to be compared at all, must be compared with the charges applied to others who transport merchandise. Comparing the caravan fee combined with the mileage tax against the registration fees to which charge other classes are amenable and computing under the provisions of Chapter 169 it will be observed that the same truck referred to by appellant would in fact be required to pay the following registration fees:

	IF NEW		IF TWO YEARS OLD	
	Flat sum	Per mile for 166 mi.	Flat sum	Per mile for 166 mi.
If weighing 25,000 pounds unladen	$478.00	$2.87	$357.00	$2.15
If weighing 12,500 pounds unladen	228.00	1.37	179.00	1.07
If weighing 5,000 pounds unladen	78.00	.46	57.00	.34

	CARAVAN CHARGES IF TOWING CAR		IF TOWED CAR	
	Flat sum	Per mile for 166 mi.	Flat sum	Per mile for 166 mi.
If weighing 25,000 pounds unladen	$7.50	6¢	$5.00	4½¢

It is thus plainly obvious that if the charges applied to other similar classes are to be taken into consideration as evidence in determining the nature of the tax about which appellant complains, appellant is being undercharged and the amount is not enough to compensate the state for the road use extended.

These conclusions are reached without taking into consideration the ton mile charges and other obligations placed

on carriers for hire under the terms of Chapter 154. (Appendix L).

ANSWER TO APPELLANT'S CLAIM OF CONFLICT IN REASONING OF DISTRICT COURT.

At the bottom of page 29 and top of page 30 of his brief, appellant claims to have discovered an inconsistency in the reasoning of the District Court. Appellee is unable to follow appellant's argument. The fact that a mileage tax is provided for and can be imposed in addition to the caravan permit fee does not prove that such mileage tax can be easily collected from all persons engaged in caravaning automobiles. Under the provisions of Section 4, Chapter 136 (Appendix B) the driver of a vehicle passing through a port of entry is required to declare, among other things, the highway or highways he intends to use in the state and the place he intends to leave the state, but there is no provision in the act requiring him to check out at a port of entry on departure from the state. The difficulty of collecting a mileage tax under these circumstances is apparent. The distinction between this type of a mileage tax and the mileage tax required under Chapter 154 of the Session Laws of 1933 (Appendix M), where the motor carrier subject to the tax is required to be licensed, obtain a permit and furnish insurance and make monthly reports, and the ease of collection of such tax when compared with the mileage tax provided under Chapter 136, the port of entry tax, is apparent. (At this point we call attention to the fact that there is nothing in this case showing the mileage tax has been assessed or collected from the appellant.)

We therefore submit that there is no inconsistency in the expressions quoted in appellant's brief from the opinion of the trial court.

ALLOCATION OF MONEYS COLLECTED UNDER CHAPTER 56

This brings us to the consideration of the analysis attempted by the appellant of the allocation of the moneys collected under the provisions of Chapter 56, to which he

refers on page 14 of his brief, and again on page 30. Appellee takes exception to such analysis and submits the following as the true picture under the facts and the relevant statutes.

On page 14 of appellant's brief he sets out a table from which he deduces that "43.6 cents (out of each dollar collected from him under Chapter 56) are used for purposes in no way relating to the construction or maintenance of highways or to the policing thereof in the interest of public safety." This statement is erroneous on the face of appellant's tabulation alone. Thus the following amounts, which total 62.4 cents of each dollar collected as shown by appellant's computations on page 14 of his brief, are on the face of the statute allocating such proceeds, Chapter 93, (Appendix C) directly allocated to highway construction and maintenance and the policing thereof: Expense of administration $0.06, state road fund $0.423, county road fund $0.141. Appellant's error apparently lay in not including the county road fund figure in his computation.

Therefore, on the face of Chapter 93 (Appendix C) of every dollar exacted from appellant by the act of which he complains, only 37.6 cents appear to be allocated to purposes other than highway construction and maintenance and registration and control of motor vehicle traffic. *But of that 37.6 cents, practically all, if not entirely all, can be accounted for as going, directly or indirectly, to such purposes, as we now proceed to show.*

The agreed stipulation of facts, numbers 12 to 16 and 26 to 29, inclusive, (R. 45, 47) sets forth the amounts collected by the ports of entry between various dates. It also shows total expense of operating the ports of entry of the State of New Mexico under Chapter 136 (Appendix B). Without going into too much detail these stipulated facts show that from July 1, 1935, the date the ports of entry were established, to September 4, 1935, the total collections through the ports of entry amounted to $13,316.22, and that the total expense of operating the ports of entry from July 1, 1935 to August 31, 1935, was $7,052.68. In other words, more than fifty per cent of all fees and taxes collected at such ports under all laws was required to pay the operating expense of the ports of entry during that period.

While it does not appear in the record, the fact is that since all the ports of entry have been established the cost of operating them has approximated forty per cent of the license tax and fees collected through the ports of entry.

Under the provisions of the Port of Entry Act the net of the fees, taxes and licenses collected is distributed to the proper funds and departments. The cost and expense of operating the ports of entry are likewise proportionally charged against the various funds benefitted by the collections made through the ports of entry. (Sections 9 and 10, Chapter 136, Appendix B).

It follows therefrom that upon the stipulated facts fifty per cent of the charges exacted from the appellant is used to defray the cost and expense of administering the Port of Entry law, and the appellant certainly can not be heard to say that this is not a proper allocation of the proceeds of the fees of which he complains.

It is therefore plainly evident that half of the above computed amount of 37.6 cents per dollar is devoted to the expense of administering the Port of Entry law (Appendix B), which is a fundamental highway traffic control law.

We proceed further. Referring again to appellant's table on page 14 of his brief, and to the figure set out therein as "State general fund $0.141", we desire to point out that such amount is devoted to the construction, repair and policing of the highways. What happens is that it reimburses the state general fund for a part of the amount expended therefrom for those purposes. Section 64-316, New Mexico Compiled Statutes, 1929 (Appendix D) provides for the levy of an annual ad valorem property tax of one and one-half mills upon all taxable property in the state for highway and bridge construction. The New Mexico State Police is maintained from general revenues of the state at an annual expense of $105,000 per year. See Stipulation of Fact XXXI (R. 48). The State Police, among other general law enforcement duties, patrol the highways including the highway used by appellant, and possibly twenty-five per cent of their time is consumed in handling and regulating caravan traffic. (R. 52).

Section 64-210, New Mexico Compiled Statutes, 1929, (Appendix E) provides for a county ad valorem property

tax for county road and bridge purposes. See also Stipulation of Fact XXXV (R. 49).

Paragraph XXXIV, Stipulation of Facts (R. 49) shows that $68,000 of property taxes were received and expended by the State Highway Department for the fiscal year ending June 30, 1934, for road purposes.

It therefore clearly appears that the above described $0.141 allocated to the state general fund is only in the way of partial replacement or reimbursement of the amounts derived from general ad valorem property tax levies devoted to highway construction and maintenance.

At page 14 of his brief appellant states that 23.5 cents of each dollar is diverted to "School funds, county and district." With this we do not agree. Chapter 93 (Appendix C) provides that 25 per cent (appellant's figure 23.5 per cent) shall be paid over to the county treasurers of the respective counties of the state and distributed among said respective counties in the proportion that the total amount of the registration fees paid for vehicles owned in each county bears to the total amount of such registration fees paid for vehicles owned in the state. The Act then directs the County Treasurers to distribute the money so paid, as follows: Between the county funds and school district funds of such county and the general funds of the cities, towns and villages therein, in the same proportion that the receipts from general property taxes, other than taxes for state purposes, are distributed between such county and school district funds and said cities, towns and villages therein. (Appendix C).

The net result is that counsel for the appellant appears to be entirely in error in his contention that 23.5% of each dollar collected is diverted to school purposes, that he is also in error when he says at page 30 that 42.3 cents of each dollar is all that is allocated to the administration, regulation, construction or maintenance of public state highways. In the first place 50 cents of each dollar is paid out to administer the port of entry act, and it is only the net which is allocated under the provisions of Chapter 93, Session Laws of 1935 (Appendix "C").

And it should be kept constantly in mind with reference to this small percentage of the funds allocated to counties

and other local taxing districts, that the county ad valorem tax for road use purposes heretofore referred to (Appendix "E") comes from the same districts and the same taxpayers which may receive the extremely small benefit of such funds.

After making all of the foregoing somewhat detailed explanation of the disposition of the proceeds of the fees of which appellant complains, it is to be remembered the best and full answer to appellant's contentions is the following. Chapter 56, the act in question, possesses, within itself and in the light of related statutes, all except one of the precise indicia which reveal an exaction for the purpose of traffic regulation and for the privilege of conducting a business upon the state's highways. (The only one of such indicia it can be said to lack is the feature that it does not vary precisely with the mileage travelled, but this has been declared to be of no importance in four of the cases of this Court which we have discussed above). The indicia it possesses we have also discussed at length in Part II hereof. One of these indicia is that all of it except an almost infinitesimal part is devoted to highway construction and maintenance and traffic regulation. With this index so present, and as it likewise possesses all of the other commonly considered indicia, we submit that the act cannot be held to be invalid as to interstate operators.

III.

APPELLEE'S ANSWER TO APPELLANT'S POINT III.

In his Point III appellant urges that Chapter 56 is unconstitutional, because repugnant to the "equal protection of the laws" clause of the Fourteenth Amendment.

From page 32 to the top of page 35, he repeats and argues at greater length his claim as made on page 20, that the classification of "caravaning" is improper and discriminatory. To answer this, we refer the Court to our argument commencing with our Point II. To avoid carrying this brief to undue length, we do not repeat in full our previous argument here. We summarize it by saying that

the description of the class as confined to the movement of motor vehicles on their own wheels, for the purpose of selling or offering same for sale, includes the entire class of integrated fleet movements of motor vehicles over the highways of the state, and none other, and that no similar movement, not included within the definition of the class, exists. We again call the Court's attention to the first sentence at the top of page 34 of appellant's brief, in which he admits that "a proper tax classification of vehicles moving in integrated groups or fleets might be proper." The difficulty appellant gets into by making that concession (which conclusion, of course, seems perfectly obvious), is that such integrated fleet movement is precisely the movement that is defined and included in the classification made by the act. See the cases cited in the first part of our Point II. As an additional reason to justify the classification, we refer the Court to our argument set forth under Point II at pages 14 to 17, that the two limitations of the class are reasonably valid and bear a direct relationship to the purpose of the tax, that is, the limitation of the class to motor vehicles being moved for purpose of sale segregates those using the highways for gain from those who use the roads for ordinary private purposes, and that the physical characteristics of the movement justify the further sub-division of the broad class of those who use the roads for gain.

Appellant, in criticizing the classification, cites the argument propounded in the dissenting opinion in the lower court to the effect that the difference in the tax rate between towing and towed vehicles encourages, rather than discourages, the movement of cars in tandem, because the rate applied to the towed vehicle is less than that which would be applicable if it were driven singly. If the only evil sought to be cured or regulated by the act were the movement of vehicles in tandem, this argument might have some force. However, attention is called to the fact that many other evils are the subject of regulation. The majority opinion indicated the danger resulting from disinterested, inexperienced drivers, the traffic hazards from the movement of vehicles in long processions or fleets, and the congestion resulting from parking such vehicles in groups when car trouble was incurred, and other factors.

The legislature, in dealing with the problem of caravaning, had before it a specific problem of legislation. Apparently it decided, in its own judgment, that the problems and evils of caravaning would be minimized to some extent if caravan cars were hooked together in tandem. The judgment of the legislature as to the precise details of the legislation by which the caravaning problem was to be controlled or the measure of compensation to be paid by caravaners, that is, the inner details of the act, falls into the area wherein the judgment of the legislature is supreme and is not subject to review by the Courts. It is a familiar principle that the wisdom alone of a legislative plan of regulation is not a question for judicial review.

Carley & Hamilton vs. Snook, 281 U. S. 66.

It is only logical to conclude that the legislature thought that the separation of each of the hook-ups and the provisions of drivers for each car would merely tend to augment the number of inexperienced and irresponsible drivers, to increase, to some degree, the spacing between the respective cars in the procession and thus elongate the same, increasing the hazards as the result of procession movements.

THE STATUTE IS BOTH A POLICE AND REGULATORY MEASURE AND A MEASURE TO EXACT COMPENSATION FOR USE OF THE STATE HIGHWAYS.

Appellant contends that paragraph (d) of Section 1 of Chapter 56, is not a police or regulatory measure and endeavors to support such contention by claiming that the statute does not contain within itself specific police or regulatory requirements. It is a familiar rule that a statute need not depend for its constitutionality upon the provisions contained within the four corners of the act. *Gregg Dyeing Co. vs. Query*, 286 U. S. 472. A mere reading of paragraph (d) of Section 1, Chapter 56, shows that the act does, within its four corners, contain certain regulatory features, to-wit, registration and the carrying of placards for purposes of identification; and a casual reading of the

general regulatory statutes of the state discloses numerous other traffic regulations to which caravaners are amenable, such as general traffic and safety laws. The record shows (testimony of the witness Gonzales) the need for special attention to those engaged in caravaning in order to enforce such general traffic regulations. The tax is obviously an attempt to secure some restitution for the special expense incurred by the state in the enforcement of ordinary traffic regulations against the business of caravaning.

Appellant then contends that the classification is unrelated to the objects of the statute. The classification is clearly identified with the objects of the statute and in support of our contention in this respect, we refer to our arguments under Point II.

SPECIFIC PROVISIONS OF PARAGRAPH (D), SECTION 1, CHAPTER 56, ARE NOT DISCRIMINATORY.

Appellant first contends under this sub-heading of his brief (page 37), that the exemption of motor vehicles licensed by the state of New Mexico, in itself, constitutes an unlawful discrimination against caravaners engaged in interstate commerce. His argument is that because automobiles having regular New Mexico license plates, and which are transported upon the highways thereof for the purpose of sale, are not subject to the caravan fees which he attacks, he is thereby discriminated against.

The complete answer to this contention is that under the provisions of paragraph (d), Section 1, Chapter 56, the non-resident caravaner is given the absolute optional right to take out a license under the general registration statutes of the state, or in the alternative, to pay the caravan fees and obtain a special permit. In face of this, there is and can be no discrimination.

NO QUESTION OF DISCRIMINATION BETWEEN RESIDENTS AND NON-RESIDENTS CAN ARISE IN THIS CASE, BECAUSE A DEALER IN MOTOR VEHICLES RESIDENT IN NEW MEXICO AND HAVING A DEALER'S LICENSE AS PROVIDED IN SECTION 11-330, 1929 COMPILATION, MUST, IF HE DESIRES TO OPERATE AS DESCRIBED IN APPELLANT'S COMPLAINT, PAY THE SAME LICENSE FEES OF WHICH APPELLANT COMPLAINS.

In sub-paragraph (b) of Paragraph IX of appellant's complaint, appellant charges that the Act in question discriminates against him in that it "applies only to out-of-state dealers and does not apply to local automobile dealers." Appellant misapprehends the statutory law on this point. The law of which appellant complains applies to residents and non-residents alike; it applies alike to automobile dealers licensed as such by the state of New Mexico and to automobile dealers such as appellant. The point is that Chapter 56 does not confer upon holders of automobile dealers' licenses any other or different privileges than those which they had prior to the passage of such Act, and prior to such Act the holder of an automobile dealer's license had no right to "caravan" as described in appellant's complaint.

Prior to the passage of Chapter 56, dealers in motor vehicles could obtain dealers' license plates under the provisions of Section 11-330, 1929 Compilation (Appendix I). Licenses and plates obtained under this section authorized dealers to operate "*any such vehicle upon any highway for purposes of demonstration only, and not for private use or hire.*" The plates could be transferred from one vehicle to another. Section 11-330 provided, in part, "The annual registration fee to be paid by such dealers shall be $50.00 which shall entitle him to one pair of plates and he shall be required to pay $10.00 for each pair of extra plates he may use."

Now it is obvious that such section gave dealers no right to "caravan"; that is, to move vehicles across the highways of New Mexico for the purpose of transporting them to the place where they were to be sold. That section gave them the right to operate "*for purposes of demonstration only*". *Oden Buick Co., Inc., v. Roehl*, 36 N. M. 293; 13 Pac. (2d) 1093. What it means to "demonstrate" an automobile is, of course, familiar to all. It is a part of the art of selling a car to an actual prospective customer present in person. See copy of opinion of Attorney General rendered September 6, 1935, wherein the Attorney General construes the provisions of Chapter 56 at the request of the officials of the State of New Mexico charged with the administration of the Act. (R. 28-30).

It should further be clearly understood that prior to passage of Chapter 56 no one, a resident or otherwise, a dealer or otherwise, could "caravan" without paying the regular license fees required for motor vehicles in general. This is the plain statutory law on the subject and appellant can point to no statute which would give him, or anyone else, the right to "caravan" prior to the passage of Chapter 56 without paying the full general license fee for each vehicle.

The question then arises: What effect does Chapter 56 have upon said Section 11-330 (Appendix I)? The part of Chapter 56 involved at this point is the following:

> "(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:
>
> 1. Is licensed by the State of New Mexico; or
> 2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer."

Sub-paragraph 3, following the above, is the part which is specifically attacked by appellant and provides for the special permits of which he complains.

It will be observed that that part of paragraph (d) which is above set out and which is prior to sub-paragraph 1 is negative and prohibitory.

The question, then, is whether Chapter 56, and particularly paragraph (d) thereof, has repealed by implication that part of Section 11-330 which limited the use of dealer's license plates to *demonstration only*. It is submitted that it has not. (Obviously there is no express repeal.)

It is axiomatic that repeal by implication is not favored; that it arises only where two statutes are, in whole or in part, irreconcilable; that it is the duty of the Court, if

possible, to give effect to both statutes. Cases on these points have been heretofore discussed.

An examination of paragraph (d) and sub-paragraph 2 thereof will disclose that all sub-paragraph 2 accomplishes is to save for dealers the rights they already had to *demonstrate only* by virtue of Section 11-330. Were sub-paragraph 2 not included in paragraph (d), then, clearly, paragraph (d) would repeal by implication the demonstration privileges conferred by dealers' license plates. But sub-paragraph 2 being included in the Act, the previously existing right to demonstrate by the use of dealers' plates was saved to dealers; but unless Section 11-330 has been repealed by implication by paragraph (d), dealers were given no additional rights by paragraph (d).

The right to demonstrate is included in the rights described in paragraph (d); that is, by its well known meaning in connection with motor vehicles "demonstrate" means "offering the same for sale", in the restricted sense that a prospective purchaser is actually present. Automobiles are, of course, offered for sale when placed in the dealer's show room, but no one would say that while they are sitting there unattended and without a prospective purchaser present, that they are being "demonstrated".

Paragraph (d) includes more extensive rights than demonstration; but it cannot be said that it shows an intention to confer upon holders of dealers' licenses rights other than those had under dealers' licenses previously. If is in the negative, prohibitory. If it had been couched in affirmative language to the effect that any person, firm or corporation may use the highways for the purposes therein described by qualifying as described in sub-paragraphs 1, 2 and 3, then there would be no question but that automobile dealers' license plates conferred the rights to "caravan" without more. But the negative form simply says that no person shall do a large number of things unless they are qualified. One of the things permitted by section (d) is a right already existing in the holders of dealers' license plates, and these rights are saved and not enlarged by the inclusion of sub-paragraph 2.

To say that paragraph (d) has given to holders of dealers' licenses plates the right to "caravan" is to say

that the legislature intended to add, at no increase in cost, the "caravaning" privilege to the demonstration privilege.

The legislature, in including sub-paragraph 2 in paragraph (d), cannot be said to have had any other intention than to have made it "cumulative" of the right already existing; that the legislature intended sub-paragraph 2 to be (quoting from *Wood v. U. S.* 16 Peters, 342, 10 L. Ed. 987) "*in aid of the purposes of the old law even when some of the cases provided for may equally be within the reach of each.*" And, there is obviously not "*a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former.*"

Wood v. U. S. 16 Peters, 342
U. S. v. Lee Yen Tai, 185 U. S. 213
Graham v. Goodcell, 282 U. S. 409
[illegible]nick v. Brown, 286 U. S. 131

THE CONTEMPORANEOUS CONSTRUCTION PLACED ON THE STATUTE SUPPORTS APPELLEE'S CONTENTION AS TO ITS MEANING.

Appellant, at page 42, contends that while it does not appear in the record, he believes Appellee will not deny that after the effective date of Chapter 56 no attempt was made by Appellee to collect the tax required by subdivision (d) of Chapter 56 from local dealers. Appellee makes no such admission. Appellant from this contention then presumes to prove that the contemporaneous construction placed upon the statute by the officials of the state supports the view that New Mexico dealers are, by the terms of paragraph (d), Section 1 of Chapter 56, permitted to caravan without payment of any charge therefor. The record specifically shows the contrary to be the case. The opinion of the Attorney General upon this question was set out in full in respondent's return and answer to the bill of complaint, and appears in full at pages 28-30 of the transcript of the record.

COMPLETE ANSWER TO APPELLANT'S CHARGE OF DISCRIMINATION IN FAVOR OF RESIDENT AUTOMOBILE DEALERS, MADE IN HIS POINT III, IS THAT THERE IS NO EVIDENCE TO SHOW THAT RESIDENT DEALERS ACTUALLY ENGAGE IN CARAVANING.

Appellant claims that he is unlawfully discriminated against by Chapter 56, in that he, a non-resident of the state and a dealer in automobiles at Los Angeles, California, in moving his automobiles through the state in caravan, is required by paragraph (d), Section 1 of Chapter 56, to pay permit fees or license fees which are not required of a resident dealer engaged in caravaning.

One of the complete answers to this contention is that there is no evidence in the record that any automobile dealers resident in New Mexico do engage in the moving of automobiles over the highways of the state on their own wheels for the purpose of sale. It is a familiar principle of law that one who assails a statute as discriminatory must prove that the discrimination of which he complains does *in fact* exist.

In *Williams vs. Baltimore*, 289 U. S. 36, a state law was attacked as discriminatory because it exempted a certain insolvent railroad from taxation. The court said, at page 42:

> "We are told that the signs of an arbitrary preference are written on the statute because the exemption is confined to this particular insolvent when it might have been extended to all other insolvents engaged in a like business. There is nothing to show that any Maryland railroad, other than this one, was in the hands of a receiver. The assailants of the statute have the burden of proving everything essential to their case."

Also on this point see:

O'Gorman & Young vs. Hartford Fire Insurance Co. 282 U. S. 581.
Corporation Commission vs. Lowe, 281 U. S. 431
Sweet vs. Rechel, 159 U. S. 380.

Further answering Appellant's claim of discrimination:—

Reference to Section 11-330 (Appendix I) shows that New Mexico dealers pay certain fees not required of Appellants. There is no showing in the record that the resultant burden of the registration fees or caravan permit fees upon the appellant falls with an economic burden disproportionate to that upon the resident dealers. (See *Interstate Busses Corp. vs. Blodgett*, 276 U. S. 245.)

In addition to these fees the resident dealer is required to pay ad valorem property taxes on all cars carried by him upon the floor of his salesroom (Appendix M). See also case of *Oden Buick Sales vs. Roehl*, 36 N. M. 293, 13 Pac. (2nd), 1093.

IV.

APPELLANT IS NOT IN A POSITION TO URGE THE UNCONSTITUTIONALITY OF THE STATUTES IMPOSING THE FEES IN QUESTION.

Throughout this entire proceeding appellant has made no claim that any provision of the laws of the State of New Mexico other than Chapter 56 (Appendix A) is invalid or unconstitutional. No issue was joined in the trial of the cause as to the validity or constitutionality of any other provision and in this case, as it stands, the court is without power to hold any other provision invalid.

Although, at a number of places in his brief, appellant refers to Chapter 56, in fact, his entire argument is directed against only paragraph (d) of Section 1 of said Chapter 56. His entire attack is directed against the imposition of the special caravan fees provided in said Section (d).

Attention is called to the fact that Chapter 169 (Appendix J) lays down the general rule that all motor vehicles operated over the highways of the state must be registered in accordance with the terms of said Chapter. Chapter 56 contains certain exemptions which must be construed strictly against the one claiming the exemption. *Camas Stages v. Kozer*, supra.

The first three paragraphs of Section 1 of said Chapter 56, to-wit, (a), (b) and (c) deal with non-residents of the State. Paragraph (d) of the same section deals with the class therein described and refers to both residents and non-residents. Paragraph (a) provides, for a non-resident owner, certain exemptions "unless otherwise provided in this section." Paragraph (d) is in the same section. Paragraph (a) extends exemption from registration to a certain broad class of non-resident owners. Paragraph (b) of the same section is a limitation on the exemption contained in paragraph (a) and by its terms specifically deletes from the exempted class all those non-resident motor vehicle owners engaged in the "transportation of merchandise". At no point in this proceeding has appellant attacked the classification of those engaged in the transportation of merchandise, nor has appellant with any definiteness assailed the right of the State of New Mexico to exact from all motor vehicle users, including non-resident owners, the regular license plate registration fees imposed by Chapter 169. Paragraph (d) of Section 1 of said Chapter 56 is a further limitation of the exemption from registration set forth in paragraph (a) of the same section, and must be read in conjunction with the limitation contained in said paragraph (b). Paragraph (d) gives appellant the right, in the alternative, to pay either the registration fee imposed under the terms of Chapter 169, referred to and limited under the provisions of said paragraph (b) of Section 1 of Chapter 56, or the special caravan permit fee provided in sub-paragraph 3 of said paragraph (d). A comparison of the amounts exacted as license fees and the amounts provided as special caravan permit fees discloses the fact that in some cases, dependent upon the circumstances and time of year when application is made, the registration fees are lower than the caravan permit fees.

Common sense gives force to the conclusive presumption that appellant would pay whichever charge is the lower, dependent upon the facts and circumstances. The same persuasive reasoning leads to the conclusion that appellant is not, by law, compelled to pay any caravan permit fee unless it is lower than the registration fee.

By the terms of said paragraph (d) appellant is, therefore, placed in a preferred position. By striking all of paragraph (d) of Section 1 of said Chapter 56 paragraph (b) would still remain. Appellant has made no attack upon paragraph (b) of the same section, although he has, on some occasions, referred to the invalidity of Chapter 56. He has advanced no reason or arugment for the invalidity of any portion of Chapter 56 other than paragraph (d) of the same chapter. Certainly appellant has at no point in the entire proceeding challenged the provisions of Chapter 169, under the terms of which the obligation to pay the registration fee is imposed. If all of paragraph (d) were stricken paragraph (b) would still remain. Even if all of Chapter 56 were held invalid Chapter 169 would still remain. No provision of any of the challenged portions of the law imposes any burden upon appellant any greater than that imposed by Chapter 169. Appellant, being in a preferred class, is not in a position to challenge the preference to his class. If paragraph (d) or indeed all of Chapter 56 should be found by the court to be void as applied to appellant, and if harm is done by the provisions of said paragraph (d) or Chapter 56 in its entirety, it is not done to the appellant and he cannot complain.

V.

APPELLEE'S ANSWER TO APPELLANT'S POINTS IV, V AND VI.

Under Point IV appellant contends that the District Court erred in overruling appellant's objections to admission in evidence of facts set out in the Stipulation of Facts

The only objection made to these specific facts is that they were not material to the issues.

A sufficient answer to this contention is that there is nothing in the record to show (admitting for the sake of the argument that some or all of the challenged facts were immaterial) that the trial court was in any way influenced by such facts in arriving at its ultimate holding in this case.

Under Point V the Appellant contends that the District Court erred in making its Findings of Fact, Numbers 2, 3, 4, and 5, over Appellant's written objections.

The answer to this argument requires an examination of the evidence in the case, which includes both the stipulated facts and the oral testimony of the witness Gonzales. Without going into detail we submit that Findings of Fact Numbers 2, 3, 4, and 5, are all amply supported by substantial evidence.

Under Point VI Appellant contends that the District Court erred in entering its decree upon the insufficient findings of fact made by it.

We understand the recognized practice of the Federal Court to be that on assignment of error to the effect "The District Court Erred in Entering Its Said Decree Upon the Insufficient Findings of Fact Made by It in This Cause." presents no question for review.

CONCLUSION

Wherefore appellee submits that there is no error shown in the record and that the judgment and decree of the District Court dismissing the case and assessing damages should be affirmed.

Respectfully submitted,

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APPENDIX "A"

CHAPTER 56, LAWS OF 1935

AN ACT TO AMEND CHAPTER 139 OF THE SESSION LAWS OF 1933 RELATING TO REGISTRATION FEES FOR MOTOR VEHICLES.

House Bill No. 71; Approved February 21, 1935.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. That Chapter 139 of the Session Laws of 1933, be and the same is hereby amended to read as follows:

"11-321. Registration by non-residents.

"(a) A non-resident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the state, county or other place for which the owner is a resident and which at all times when operated in this state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without registering such vehicles or paying any fees to this state, during a period of three months from the time such vehicle is first brought into this state.

"(b) A non-resident owner of a foreign vehicle operated within this state for the transportation of persons or property for compensation or for the transportation of merchandise, shall register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state; Provided, however, that motor vehicles properly licensed in any other state or country, operated for compensation or hire, which are used exclusively in the transportation of livestock, lumber, farm or dairy products, from the place of production to market, or in the transportation of a return load of livestock, farm or dairy products or lumber, may be allowed to make trips within the state and remain on each trip within the state

not exceeding four days, without being registered or required to pay the mileage or other fees, in this state, in the event that under the laws of such other state or country, similar or like exceptions are granted to motor vehicles registered under the laws of and owned by residents of this state.

"(c) Every non-resident, including any foreign corporation carrying on business within this state and owning and regularly operating in such business any motor vehicle, trailer or semi-trailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state Provided, however, salesmen, agents or representatives with no permanent place of business in this state and who are traveling through the State for the purpose of calling on retailers, wholesalers or jobbers for the purpose of taking orders for future delivery, shall be required to register any motor vehicle used by them in such business and pay therefor a registration fee of Five ($5.00) Dollars, for which an appropriate license tax shall be furnished by the motor vehicle commissioner.

"(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or
2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or
3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Com-

missioner of revenue of the State of New Mexico upon application on such form as said Commissioner may prescribe and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. All permits so issued shall be evidenced by certificates, issued by said Commissioner, which shall show upon the face thereof the registration number assigned to each such vehicle, the name and address of the owner thereof, the manner of transportation thereby authorized and a description of the vehicle so registered including the engine number thereof. Such certificate shall be carried at all times by the person in charge of such vehicle or vehicles. A suitable tag or placard shall be issued by the Commission with such certificate and shall be at all times displayed on each such vehicle whether the same is being so transported singly or in a caravan. No such permit, certificate, tag or placard shall be used upon or in connection with the transportation of any vehicle other than the one for which the same is issued."

Section 2. That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico that this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this Act shall take effect and be in full force and effect from and after its passage and approval.

APPENDIX "B"

CHAPTER 136, LAWS OF 1935

AN ACT TO CREATE PORTS OF ENTRY TO AID IN THE REGULATION OF THE USE OF THE PUBLIC HIGHWAYS OF THIS STATE BY MOTOR VEHICLES, AND TO AID IN THE COLLECTION OF TAXES AND THE ENFORCEMENT OF STATE AND FEDERAL POLICE AND HEALTH LAWS; CREATING A PORT OF ENTRY BOARD; DEFINING THE POWERS AND DUTIES OF SAID PORT OF ENTRY BOARD AND THE RIGHTS AND DUTIES OF OWNERS AND OPERATORS OF MOTOR VEHICLES; IMPOSING MILEAGE TAXES; PROVIDING PENALTIES FOR THE VIOLATION HEREOF, AND REPEALING ALL ACTS AND PARTS OF ACTS IN CONFLICT HEREWITH.

Senate Committee Substitute for Senate Bill No. 78; Approved February 28, 1935.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. In order to facilitate the enforcement of the laws of this State concerning "motor vehicles", "common motor carriers of property", "common motor carriers of passengers", "contract motor carriers of property", and "contract motor carriers of passengers", upon the "public highways" of this State, as each of said terms is defined by Chapter 154, New Mexico Session Laws of 1933, and to promote the safety and welfare of the public, the preservation and maintenance of the public highways, and the integrity of the regulation of motor carriers, and to more efficiently enforce the payment of registration fees, licenses, mileage taxes, and other charges imposed by law upon motor carriers of passengers for hire and for the transportation of property, and to aid in the collection of other taxes and the enforcement of other laws, it is hereby declared necessary to provide for the establishment of registration stations or ports of entry into the

State of New Mexico upon certain main highways entering the state, through which every motor carrier of passengers for hire or for the transportation of property shall enter the state, register, be inspected, and secure permission and authority to proceed into or across the State upon its public highways.

Section 2. There is hereby created a board, to be known as the "Port of Entry Board", which shall be composed of the State Highway Engineer, a corporation commissioner to be selected by the Corporation Commission, and the Commissioner of Revenue, of the State of New Mexico. Said Board is invested with power to make all needful rules and regulations to secure proper and efficient enforcement of this Act and other laws of the State of New Mexico not inconsistent with or in derogation of the powers, duties, and responsibilities placed by existing statutes upon the Corporation Commission, the State Highway Department, the Commissioner of Revenue or any other State authority, but supplementary thereto and in aid thereof. It is declared necessary for all such State Departments and Officials to cooperate and co-ordinate their actions and efforts for the proper and efficient enforcement of this Act. If any such official or department shall feel aggrieved at any order, rule, or regulation promulgated by the Port of Entry Board and shall desire to resist the same, he or it shall, within five days after its promulgation by the Port of Entry Board, serve written notice upon the chairman of said Board that he or it appeals from said order, rule or regulation, to the Governor, and the Port of Entry Board shall forthwith certify to the Governor the order, rule or regulation so appealed from and the Governor shall fix a time and place for a hearing thereon. The Port of Entry Board shall cause all interested parties to be notified of the time and place of such hearing, and at said hearing all persons interested shall be given opportunity to be fully heard, and the Governor shall thereupon decide such appeal, and his decision shall be final, conclusive and binding upon each of said departments and all persons concerned.

Section 3. The Port of Entry Board shall designate a sufficient number of the main highways entering this

State to reasonably meet the needs and requirements of persons operating motor vehicles for the transportation of passengers for hire and for the transportation of property who enter this State from points beyond its boundaries, and shall establish on each of said designated highways a registration office or port of entry where inspection and registration service shall be maintained. The Port of Entry Board is hereby authorized and empowered to appoint such deputies, agents and employees as it deems necessary properly to conduct and manage the affairs of such registration offices, and to give service at such registration offices and ports of entry reasonably necessary to meet the needs and requirements of all persons required to register and receive inspection thereat.

The Commissioner of Revenue may in his discretion deputize persons in charge of or employed at ports of entry to act as his agents in the collection of all fees and taxes required by law to be collected by the Bureau of Revenue, and such persons in charge of or employed at ports of entry shall, while engaged in the performance of their duties in enforcing this act and collecting the fees, licenses and taxes required to be collected by the terms of this act, be considered and held to be the deputies and agents of the departments or official charged with the collection of the same.

Section 4. Every motor carrier who shall transport into this state any property, or who shall transport into this state any passengers for hire, by means of the public highways of this state must enter the state on a highway designated as heretofore provided, and shall without delay stop at the registration office or port of entry established on such highway and register, and submit to inspection. The driver of the motor vehicle shall immediately make out and deliver to the inspector at such port of entry a card showing the name of the owner of the vehicle, the name of the operator, or driver, the name of the forwarding or other company in whose service said vehicle is licensed, the license number, the state in which said vehicle has been granted a common or contract motor carrier permit, if any, and number of such permit, the motor number, and the serial number of the vehicle, and a description of such

vehicle, whether automobile, truck, trailer, semi-trailer, tractor, motor bus or other type of motor-driven vehicle, the point or origin of the shipment, the ultimate destination of the shipment, the gross weight of vehicle and cargo, and the factory list capacity or the actual capacity if rebuilt, the number of taxable miles to be traveled within the state and the nature, amount and coverage of all public liability or other insurance carried upon said vehicle and upon the cargo thereon. The driver of said vehicle shall likewise declare upon said registration card, the name and number of the highway or highways which he intends to use within the State and the place where he intends to leave the State. Said card shall be signed by the operator or driver and filed with the person in charge of said registration station. The driver or operator of said vehicle shall likewise deposit with the person in charge of said registration station or port of entry a full, true and correct copy of his manifest, which shall show the precise nature and character of the cargo and the weight thereof, and shall be certified as a true and correct copy of the original manifest by the issuer thereof.

The person in charge of such registration station or port of entry shall verify the information contained upon said card and manifest, and shall check the license, permit, motor and serial numbers, weight and description of the vehicle. Such person shall likewise inspect said vehicle and ascertain whether the same is in safe and roadworthy condition, properly equipped with all lights, brakes and other appliances required by any statute of this state, in such condition as to be safe for operation upon the public highways of this state.

The person in charge of said port of entry or registration station shall likewise satisfy himself as to the nature and character of the cargo, of the weight thereof, and is authorized to do any and all things necessary to obtain full and complete information in respect thereto, and if in doubt as to the declared weight may order the same weighed before issuing any clearance certificate for such motor vehicle.

The person in charge of said port of entry or registration station shall further inspect the contents of such

vehicle to determine whether or not all taxes on gasoline and motor fuel, and excise taxes on alcoholic liquors, and all taxes on any other property have been fully paid.

The person in charge of the said port of entry or registration station shall further inspect such vehicle and its contents to determine whether or not all laws and all rules and regulations of the Departments of this State with respect to public safety, health, welfare and comfort have been fully complied with.

The person in charge of such port of entry or registration station shall further require from the driver or drivers of such vehicles a showing, in such form and in accordance with such rules as may be established by the Port of Entry Board, that the driving of such vehicles within this state shall not be in violation of the provisions of Chapter 61 of the Session Laws of 1933, relating to the hours of service of drivers and chauffeurs.

Section 5. No motor vehicle transporting passengers for hire or transporting property shall be allowed to proceed from a port of entry into the State of New Mexico upon the highways thereof until and unless it has been duly registered and inspected at such point of entry or registration office and a clearance certificate issued therefor.

Section 6. After such registration and inspection clearance certificates or special permits shall be issued for:

(a) Motor vehicles operating in compliance with the provisions of Chapter 154 of the New Mexico Session Laws of 1933 and acts amendatory thereof when

(1) All taxes required by the laws of this state upon the contents of such vehicles have been paid, and all other laws and rules and regulations of departments of this state applicable to such contents have been complied with; and

(2) Such motor vehicles have been found by the inspector in charge of such port of entry or registration station to be in a safe and roadworthy condition, duly and properly equipped with all lights, brakes and other equipment and appliances required by the laws of this state, in the interest of the safety and convenience of the public; and

(3) The operator or owner of such motor vehicle is not in default or delinquent in the payment of any tax,

the filing of any report or the observance of any requirement of said Chapter 154 of the Session Laws of 1933; and

(4) When proper showing is made by the driver or drivers in such form and in accordance with such rules as may be established by the Port of Entry Board, that the driving of such vehicles within this state shall not be in violation of the provision of Chapter 61 of the Session Laws of 1933, relating to the hours of service of drivers and chauffeurs.

(b) Motor vehicles classified and designated in Chapter 154 of the Session Laws of 1933 as exempt from the provisions of that act when

(1) All taxes required by the laws of this state upon the contents of such vehicles have been paid and all other laws and rules and regulations of departments of this state applicable to such contents have been complied with; and

(2) Such motor vehicles have been found by the inspector in charge of such port of entry or registration station to be in a safe and roadworthy condition, duly and properly equipped with all lights, brakes and other equipment and appliances required by the laws of this state, in the interest of the safety and convenience of the public; and

(3) Such vehicles have been duly licensed and are displaying such license tag or tags as are required by the laws of this state.

(c) Motor vehicles transporting property not for hire when

(1) All taxes required by the laws of this state upon the contents of such vehicles have been paid and all other laws, and rules and regulations of departments of this state applicable to such contents have been complied with, and

(2) Such motor vehicles have been found by the inspector in charge of such port of entry or registration station to be in a safe and roadworthy condition, duly and properly equipped with all lights, brakes and other equipment and appliances required by the laws of this state, in the interest of the safety and convenience of the public; and

(3) Such vehicles have been duly licensed and are

displaying such license tax or tags as are required by the laws of this state; and

(d) Motor vehicles not registered or licensed in this state but which are transporting passengers or property for hire when

(1) All taxes required by the laws of this state upon the contents of such vehicles have been paid and all other laws, and rules and regulations of departments of this state applicable to such contents have been complied with; and

(2) Such motor vehicles have been found by the inspector in charge of such port of entry or registration station to be in a safe and roadworthy condition, duly and properly equipped with all lights, brakes and other equipment and appliances required by the laws of this state, in the interest of the safety and convenience of the public; and

(3) Said vehicles shall be properly covered by liability insurance issued in some insurance company or association authorized to transact business in the state of New Mexico, with coverage for its operation within the State of New Mexico of not less than $7,500.00 for any one person, or less than $10,000.00 for all persons who may sustain injuries or be damaged in any one contingency or accident covered by such policy; and

(4) When proper showing is made by the driver or drivers of such motor vehicles, in such form and in accordance with such rules as may be established by the Port of Entry Board, that the driving of such vehicles within this State shall not be in violation of the provisions of Chapter 61 of the Session Laws of 1933, relating to the hours of service of drivers and chauffeurs; and

(5) When the mileage tax in Section 8 set forth shall have been paid.

(e) Motor vehicles not registered or licensed in this state and which are transporting property not for hire when

(1) All taxes required by the laws of this state upon the contents of such vehicles have been paid and all other laws, and rules and regulations of departments of this state applicable to such contents have been complied with; and

(2) Such motor vehicles have been found by the in-

spector in charge of such port of entry or registration station to be in a safe and roadworthy condition, duly and properly equipped with all lights, brakes and other equipment and appliances required by the laws of this state, in the interest of the safety and convenience of the public, and

(3) When the mileage tax in Section 8 set forth or the license fee in lieu thereof as in said section provided shall have been fully paid.

Section 7. Clearance certificates shall be issued to all motor vehicles described under subsection (a), (b), and (c) of Section 6; special permits accompanied by clearance certificates shall be issued to motor vehicles described under subsection (d) of Section 6; and a permit accompanied by a clearance certificate shall be issued to all motor vehicles described under subsection (e) of Section 6.

The clearance certificates issued for any such motor vehicle shall be of such distinctive color as may be prescribed by the Port of Entry Board and shall contain a large letter "C", when issued to vehicles described under subsections (a) and (c) of Section 6. To a motor vehicle described under subsection (b) the said clearance certificate shall be of a different distinctive color to be prescribed by the Port of Entry Board, and shall contain a large letter "E" indicating that said motor vehicle is exempt. Special permits shall also be of some distinctive color and shall contain a large letter "S" indicating that the same is "Special."

The certificates of clearance and special permits shall show such data as the Port of Entry Board shall prescribe, but in any event the same shall include the serial and motor number of the vehicle together with the license or tag number of such vehicle, the date such certificate is issued, the port of entry at which such certificate issued and destination to which issued and the amount, if any, paid at the time of the issuance of such certificate or special permit.

Such certificates of clearance and special permits shall be in the form of stickers in such size and form as may be prescribed by the Port of Entry Board, so that they can be readily fastened to the windshield of the motor vehicle, and such certificates of clearance and special permits must

remain upon the windshild of the motor vehicle until the trip for which they have been issued has been completed.

The certificates of clearance and special permits provided for in this Act shall be valid only for the specific trip for which the same are issued.

Not more than two special permits shall be issued in any one calendar month to any one motor vehicle described in subsection (d) of Section 6 of this act.

Section 8. There is hereby levied and assessed against motor vehicles in subsection (d) of Section 6, for the administration of this act and for the maintenance, repair and reconstruction of the public highways a mileage tax which shall be computed as follows:

(1) Where the gross weight of vehicle and cargo does not exceed fifteen thousand (15,000) pounds, one and one-half (1½) cent per mile from point of entering the state to the point of destination or place of leaving the state;

(2) Where the gross weight of vehicle and cargo exceeds fifteen thousand (15,000) pounds, and does not exceed twenty-five (25,000) thousand pounds, two (2) cents per mile from the point of entering the state to the point of destination or place of leaving the state;

(3) Where the gross weight of vehicle and cargo exceeds twenty-five thousand (25,000) pounds, three cents per mile from point of entering the state to the point of destination or place of leaving the state;

provided, however, that the foregoing mileage tax shall not apply to motor vehicles properly licensed in another state or country, operated for compensation or hire, which are used exclusively in the transportation of livestock or any farm or dairy products from the place of production to market, or in the transportation of a return load, provided no charge for transportation is made therefor.

There is hereby levied and assessed against motor vehicles described in subsection (e) of Section 6, for the administration of this act and for the maintenance, repair

and reconstruction of the public highways, a mileage tax, which shall be computed as follows:

(1) Where the gross weight of vehicle and cargo does not exceed fifteen thousand (15,000) pounds, one and one half (1½) cent per mile from point of entering the state to the point of destination or place of leaving the state;

(2) Where the gross weight of vehicle and cargo exceeds fifteen thousand (15,000) pounds, and does not exceed twenty-five thousand (25,000) pounds two (2) cents per mile from the point of entering the state to the point of destination or place of leaving the state;

(3) Where the gross weight of vehicle and cargo exceeds twenty-five thousand (25,000) pounds, three cents per mile from point of entering the the state to the point of destination or place of leaving the state;

In the event the owner or operator of any motor vehicle described in subsection (e) of Section 6 shall elect to register such vehicle with the Bureau of Revenue and pay the fees required for license plates for said vehicle, then and in such event the owner or operator of such motor vehicle shall be exempt from the payment of said mileage tax.

Section 9. All moneys collected under the provisions of this act by any persons in charge of ports of entry shall forthwith be remitted to the Commissioner of Revenue and by him paid over to the State Treasurer to be by such Treasurer covered into the special suspense fund provided to defray the cost of administering this act.

Section 10. All costs of administration of this act shall be paid from the respective funds for which collections are made by said ports of entry. The proportion of such cost of administration to be born by each of such funds shall be in the same ratio that the collection for the account of each of such funds bears to the aggregate amount collected by such ports of entry for all such funds.

The Commissioner of Revenue for the purpose of carrying out the provisions of this act is hereby authorized

to create a special suspense fund, with the Treasurer of the State of New Mexico, in sufficient amount to pay the expenses of the administration of this act in conformity with the provisions of this act, from the funds benefited through the administration of this act. At the expiration of 6 months after the taking effect of this act, the Commissioner of Revenue shall estimate the amount of funds necessary to carry out the provisions of this act and shall keep an amount available at all times to meet the administrative requirements of the provisions of this act. Any surplus remaining in such special suspense fund shall forthwith be turned into the respective funds of the State of New Mexico to be distributed as provided by law.

At the end of each month the Commissioner of Revenue shall make an accounting of the funds received from the operation of the ports of entry and shall determine therefrom the proportionate charge to each fund.

Section 11. The Port of Entry Board may, in its discretion, enter into cooperative agreements with the authorities of adjoining states for the joint operation of Port of Entry facilities as provided by this act, and may enter into working agreements with the authorities of the United States Government for the use of the ports of entry facilities for the administration and enforcement of federal laws now in existence or which may hereinafter be enacted.

Section 12. The Governor shall designate one member of the Port of Entry Board to act as its chairman and one as its secretary and such board may call upon any of the departments cooperating under this act for such clerical help, secretaries, stenographers and other assistance as shall be necessary to the expeditious and efficient carrying out of its duties under this act.

Section 13. The term "Transportation of Property", as used in this act, shall not only include the transportation of property in or on a motor vehicle, but shall also be construed to include the driving or moving on the public highways of any motor vehicle either under its own power or by being pulled by another motor vehicle where said vehicle or vehicles are to be sold or offered for sale to or by any agent, dealer, purchaser or prospective purchaser.

Section 14. The driving of any motor vehicle into this

state for the purpose of transporting passengers for compensation, or transporting property, without the same being first registered and inspected at a registration station or port of entry, and without there being displayed upon the windshield thereof a clearance certificate is hereby prohibited and declared unlawful.

Section 15. Any violation of this act shall constitute a misdemeanor punishable by a fine not exceeding $100.00 or imprisonment not exceeding thirty days or by both such fine and imprisonment. The payment of any fine under the provisions of this act shall not relieve the offender from the payment of any fees or taxes provided by this act or any other applicable statute of the State of New Mexico or of any other of the provisions of this act, and the vehicle and cargo may be held by the State Corporation Commission, the State Highway Department, the Commissioner of Revenue or any other official authorized to make arrests under the laws of the state, until such fine, special permit fee and costs are paid, and the offending driver may be required by the court imposing such sentence to return to the port of entry through which he should have passed and there comply with all the provisions of this Act, with which he should have complied in the first place by the terms hereof. Prosecution for any such violation may be brought in any county in the state in which such driving takes place or in which the driver of such vehicle shall be apprehended.

Section 16. If any part, portion, clause, paragraph, sentence or section of this Act shall be declared unconstitutional by any court of competent jurisdiction, it is hereby declared that this Act would have been passed without such part, portion, clause, paragraph, sentence or section, and such judgment or decree shall not affect any other part, portion, clause, paragraph, sentence or section hereof.

Section 17. All acts or parts of acts in conflict herewith are hereby repealed.

APPENDIX "C"

CHAPTER 93, LAWS OF 1935

AN ACT AMENDING SECTION 11-331 OF NEW MEXICO STATUTES, ANNOTATED, 1929 COMPILATION AS AMENDED BY SECTION 6, CHAPTER 169 OF THE LAWS OF NEW MEXICO OF 1933 WHICH AMENDED SECTION 6, CHAPTER 77 OF THE LAWS OF NEW MEXICO OF 1931, RELATING TO THE DISPOSITION OF REGISTRATION FEES, COLLECTED UPON THE REGISTRATION OF MOTOR VEHICLES.

House Bill No. 17; Approved February 25, 1935.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. That Section 11-331 of the New Mexico Statutes, Annotated, 1929 Compilation, otherwise known and designated as Section 31 of Chapter 119 of the Laws of 1929 as amended by Section 6 of Chapter 77 of the Laws of 1931 and as further amended by Section 6 of Chapter 169 of the Laws of 1933, be and the same is hereby amended to read as follows:

11-331. Disposition of Fees.

The fees collected under the provisions of this Act shall be paid over to the state treasurer not later than the close of the second business day after their receipt. *Not to exceed* Six per cent thereof shall be covered into the state comptroller motor vehicle fund, and used to defray the expense of the administration and enforcement of this Act and the discharge of such other duties as may be imposed by the state treasurer on or before the tenth day of the month next after their receipt, as follows:

Forty-five per cent thereof shall be placed to the credit of the state road fund to be used and disbursed as other moneys in the state road fund.

Fifteen per cent thereof shall be paid to the county treasurers of the several counties in this state and distributed between the respective counties in proportion that the

total amount of registration fees paid for motor vehicles each county bears to the total amount of such registration fees paid for such vehicles owned in the state, to be credited to the county road fund of said respective counties, and used for the improvement and maintenance of the public roads therein, and to pay for the acquisition of rights of way and material pits at the request of and by agreement with the state highway commission.

Fifteen per cent thereof shall be credited to the state general fund.

Twenty-five per cent thereof shall be paid over to the county treasurer of the several counties of this state and distributed between said respective counties in the proportion that the total amount of registration fees paid for vehicles owned in each county bears to the total amount of such registration fees paid for vehicles owned in the state, and the county treasurer of each county shall distribute the moneys paid to him under the provisions of this paragraph, when received, between the county and school district funds of such county and the various cities, towns and villages therein, in the same proportion that the receipts from general property taxes, other than taxes for state purposes, received by said treasurer for the year in which such distribution is to be made, are so distributed in such county between said county and school district funds and said cities, towns and villages therein. PROVIDED that in the counties wherein are located cities, towns or villages incorporated, organized and operating under special act, the county treasurer of such county shall pay to the treasurers of said cities, towns or villages a proportionate amount of said money by him to be distributed in the proportion that the receipts from general property taxes in said cities, towns or villages, bear to the total receipts from general property taxes other than taxes for state purposes received by the county treasurers and the collectors of said cities, towns or villages in the year in which said distribution is to be made. And provided further that for the purpose of effecting an equitable distribution in said counties, the collectors of said cities, towns or villages operating under special act shall, on or before the first Monday in October, certify to the county treasurer

and to the state tax commission, the assessed valuation and the total tax rate in said cities, towns or villages for such year. The remainder thereof shall be credited to the State Public School Equalization Fund.

APPENDIX "D"

SECTION 64-316, 1929 COMPILATION
(Sec. 1, Ch. 154, Laws of 1919)

§64-316. Tax levy. That in order to provide funds for carrying out the provisions of this act, and for the survey, location, construction and improvement of highways and bridges, there is hereby levied upon all taxable property in the state an annual tax of one and one-half mills upon the dollar, which tax shall be in lieu of the tax authorized by section 2642 (64-332), New Mexico Statutes, Codification of 1915.

It is hereby made the duty of the state auditor to cause such levy to be certified to the board of county commissioners of each county in the state each year, and said tax shall be extended upon the assessment rolls, assessed, and collected at the times and in the manner provided by law for the extension upon assessment rolls, assessment and collection of other state taxes; and the proceeds thereof shall be paid over by the several county treasurers, without deduction of any percentage thereof to the state treasurer and covered into the state road fund. All of the net revenue derived from the licensing of motor vehicles under any law now in existence or that may hereafter be enacted, and all penalties that may be collected under any such law, shall also be paid over to the state treasurer and covered into the state road funds.

Subject to the provisions of section 4579 (109-205), New Mexico Statutes, Codification of 1915, after providing for interest and sinking fund upon state highway bonds authorized and issued in accordance with chapter 58 of the Session Laws of 1912 by setting aside sufficient funds therefor each year out of the proceeds of the said one mill tax levy or out of moneys received from sales of certificates or debentures issued in anticipation thereof, it shall be the

duty of the state treasurer to set aside from the moneys received from collection of the taxes and licenses pledged therefor sufficient funds to provide for the payment of the interest and principal of all certificates or debentures issued under the provisions of this act.

There shall next be reserved from the state road fund a sufficient sum annually based upon estimates by the state highway engineer, to cover all expenses of the commission, salaries of officers and employees, and to pay the state's portion of the cost of maintaining the system of state highways herein provided for. The balance of the moneys in the state road fund shall be used as the commission shall determine for co-operating with the United States Government or with the several counties or municipalities of the state or otherwise, in the discretion of the commission, for the construction, improvement, or maintenance of public highways and bridges.

There shall not be charged on account of administration and engineering expenses in excess of seven and one-half per cent of the estimated cost of any work of construction, repair or maintenance upon any state highway or bridge or for work upon which aid is provided.

The tax levies herein provided for shall be excepted from the limitations of chapter 54 of the Session Laws of 1915.

APPENDIX "E"

SECTION 64-210, 1929 COMPILATION
(Sec. 10, Ch. 135, Laws of 1921)

§64-210. Assessment and levy of tax for roads. The board of county commissioners of each county in this state shall at the time of levying other taxes for county purposes each year levy a tax of not less than one mill nor more than two mills on the dollar of the assessed valuation of all property, subject to taxation in the county sufficient to produce the total amount required for said annual budget, except such portion thereof, if any, as may be produced from bond issue, special levies or other sources, and such tax levies shall not be subject to the limitations in chapter

74 of the laws of 1915, of chapter 17 of the laws of 1919; Provided, however, that the total tax levies for county purposes excepting school tax levies, special levies on specific classes of property and levies for payment of the public debt and interest thereon, including the levies herein directed to be made shall not exceed five mills in any one year.

It shall be unlawful to transfer any moneys from the county road and bridge fund to any other county fund. The county treasurer shall be liable on his official bond for any such transfer or transfers.

APPENDIX "F"

SECTION 64-212, 1929 COMPILATION
(Sec. 12, Ch. 135, Laws of 1921)

§64-212. Maintenance of roads and bridges. All county roads and bridges shall be maintained at the expense of the respective counties. All roads, and bridges upon roads, that have been declared to be a state highway by acts of the legislature or resolutions of the State Highway Commission shall be maintained at the expense of the state; Provided, that whenever there shall not be sufficient funds available in the state road fund for maintenance of all state highway mileage in any county, the state highway commission shall certify to the board of county commissioners of such county, the section or sections of such highways which it is unable to maintain at state expense and the same shall thereafter be maintained at the expense of said county until such time as there may be state funds available to maintain same.

APPENDIX "G"

SECTION 11-309, 1929 COMPILATION
(Sec. 9, Ch. 119, Laws of 1929)

REGISTRATION OF MOTOR VEHICLES, TRAILERS AND SEMI-TRAILERS.

§11-309. Owner to secure registration. Every owner

of a motor vehicle, trailer or semi-trailer intended to be operated upon any highway in the state shall, before the same is operated, apply to the department for and obtain the registration thereof, except the owner of any vehicle which is exempted by section 10 (11-310) and 35 (11-335), excepting also, when an owner is permitted to operate a vehicle under the special provisions relating to lien holders, manufacturers, dealers and non-residents, contained in sections 19 (11-319), 21 (11-321) and 30 (11-330) of this act.

APPENDIX "H"

SECTION 11-319, 1929 COMPILATION
(Sec. 19, Ch. 119, Laws of 1929)

11-319. REGISTRATION BY MANUFACTURERS AND DEALERS.

(a) A manufacturer of or dealer in motor vehicles, trailers or semi-trailers, owning or operating any such vehicle upon any highway for purposes of demonstration, only, and not for private use or hire, in lieu of registering each such vehicle may obtain from the department upon application therefor upon the proper official form and payment of the fees required by law and attach to each such vehicle one or duplicate number plates, as required for different classes of vehicles by section 30 (11-330), which plate or set of plates shall each bear thereon a distinctive number, also the name of this state, which may be abbreviated, and the year for which issued, together with the word "dealer" or a distinguishing symbol indicating that such plate or plates are issued to a manufacturer or dealer, and any such plates so issued may, during the calendar year for which issued, be transferred from one such vehicle to another owned or operated by such manufacturer or dealer who shall keep a written record of the vehicles upon which such dealers' number plates are used and the time during which each set of plates is used on a particular vehicle, which record shall be open to inspection by any police officer or any officer or employee of the department.

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APPENDIX "I"

SECTION 11-330, 1929 COMPILATION
(Sec. 30, Ch. 119, Laws of 1929)

11-330. DEALER'S DEMONSTRATION NUMBERS. A dealer in motor vehicles may, in lieu of registering each vehicle he may wish to demonstrate on any highway, apply for and secure a dealer's demonstration number, which he may use by attaching registration and number plates issued by the department to each vehicle so used for demonstration only, and not for hire or private use.

The annual registration fee to be paid by such dealer shall be $50.00, which shall entitle him to one pair of plates and he shall be required to pay $10.00 for each pair of extra plates he may use.

APPENDIX "J"

CHAPTER 169, LAWS OF 1933

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Sec. 9. That Section 28, Chapter 119 of the Laws of 1929 otherwise known and designated as Section 11-328, New Mexico Statutes, Annotated, 1929 Compilation, as amended by Section 5 of Chapter 77 of the Laws of 1931 be and the same hereby is amended to read as follows:

11-328. FEES FOR REGISTRATION.

That the following registration fees shall be collected for the registration of all trailers, semi-trailers, and motor vehicles other than tractors, in this state for the year 1930 and for all years subsequent thereto, to-wit:

(a) For each motorcycle having not more than two wheels in contact with the ground, $3.00.

(b) For each motorcycle having three wheels in contact with the ground or having a side car, $4.00.

(c) For each motor vehicle other than motorcycles, trucks, taxicabs, busses, tractors and driverless cars:

(1) When same has not been registered in any state during at least one year prior to the year for which the vehicle is being registered: $18.00 plus $2.00 for each 100 pounds or major fraction thereof, weight of such vehicle in excess of 2400 pounds.

(2) When same has been registered in any state during at least one year prior to the year for which the vehicle is being registered: $15.00 plus $1.50 for each 100 pounds weight or major fraction thereof, weight of such vehicle in excess of 2400 pounds.

(3) When same has been registered in any state during at least two years prior to the year for which the vehicle is being registered: $12.00 plus $1.00 for each 100 pounds weight or major fraction thereof, weight of such vehicle in excess of 2400 pounds.

(4) When same has been registered in any state during at least three years prior to the year for which the vehicle is being registered: $7.00 plus $1.00 for each 100 pounds weight or major fraction thereof, weight of such vehicles in excess of 2400 pounds.

(5) When same has been registered in any state during at least four years prior to the year for which the vehicle is being registered: $5.00 plus $0.50 for each 100 pounds weight or major fraction thereof, weight of such vehicles in excess of 2400 pounds.

(d) For each trailer and semi-trailer, $5.00 plus $1.00 for each 100 pounds weight or fraction thereof in excess of 500 pounds: PROVIDED that this sub-section shall not apply to any non-resident owner who shall use any vehicle mentioned in this sub-section solely for transportation of farm produce purchased by such non-resident from the growers or producers thereof, and transported in such vehicle out of the state; and PROVIDED FURTHER, that this sub-section shall not apply to farmers or ranchers who transport to market only the produce, animals or fowls produced by them or who transport back to their farms or ranches supplies for use thereon in trailers of less than one-ton capacity drawn by an automobile or truck bearing a proper license.

(e) For each motor truck:

(1) When the same has not been registered in any

state during the last two years prior to the year for which same is being registered:

(a) If such truck weighs 1600 pounds or less, $18.00.

(b) If such truck weighs more than 1600 pounds and not more than 2400 pounds, $18.00 plus $1.00 for each 100 pounds or major fraction thereof in excess of 1600 pounds.

(c) If such truck weighs more than 2400 pounds, $26.00 plus $2.00 for each 100 pounds weight or major fraction thereof in excess of 2400 pounds.

(2) When the same has been registered in any state during the last two years prior to the year for which same is being registered:

(a) If such truck weighs 1600 pounds or less, $10.00.

(b) If such truck weighs more than 1600 pounds but not more than 2400 pounds, $10.00 plus $1.00 for each 100 pounds weight or major fraction thereof in excess of 1600 pounds.

(c) If such truck weighs more than 2400 pounds, $18.00 plus $1.50 for each 100 pounds weight or major fraction thereof in excess of 2400 pounds.

(f) For each taxicab, or driverless car:

(1) When such vehicle has not been registered in any state during at least two years prior to the year for which the same is being registered $18.00 plus $3.00 for each 100 pounds weight or major fraction thereof in excess of 1600 pounds.

(2) When such vehicle has been registered in any state during at least two years prior to the year for which the same is being registered $10.00 plus $2.00 for each 100 pounds weight or major fraction thereof in excess of 1600 pounds.

(g) For each bus, except as hereinafter specified, $50.00 plus $10.00 for each seat of the normal passenger seating capacity of such vehicle.

(h) For each bus, truck or trailer which is used exclusively for the transportation of persons or property as a common carrier, contract carrier, or private carrier within the meaning of the laws of this state taking special charges for the use of the public highways and which has been registered with the state corporation commission as such common carrier, contract carrier, or private carrier

under the provisions of such laws, a license shall be issued under the provisions of this Act upon payment of one-half of the fees otherwise applicable to such vehicles under the provisions thereof.

(i) All vehicles having solid rubber tires, 25 per cent in addition to the fees specified above.

(j) All vehicles, having solid tires of material other than rubber, 100 per cent in addition to the fees specified above.

APPENDIX "K"

SECTION 11-333, 1929 COMPILATION
(Sec. 33, Ch. 119, Laws of 1929)

11-333. REGISTRATION FEES FOR OPERATION FOR LESS THAN ONE YEAR. In all cases in which it is shown to the satisfaction of the officer collecting the registration fees that the vehicle sought to be registered has not been operated on the highways of this state prior to April first of the year in which such registration is applied for, the fees collected for registering such vehicle shall be fixed at three-fourths of the amounts hereinbefore specified; and if it be shown that such vehicle has not been so operated prior to July first of such year such fees shall be fixed at one-half of the amount specified in the preceding sections hereof; and if it be so shown that such vehicle has not been so operated prior to October first of such year, such fees shall be fixed at one-fourth of the amounts specified in the preceding sections hereof; and if it be shown that such vehicle has not been so operated prior to December first of such year the fees collected for registering such vehicle shall be fixed at the sum of two dollars.

APPENDIX "L"

CHAPTER 154, LAWS OF 1933

ARTICLE IV—BONDS AND INSURANCE

Section 35. Effective herewith, every motor carrier holding a certificate of Public Convenience and Necessity

issued by the Commission shall file with said Commission a Ticket Reclaim Bond in the amount of $500.00 assuring full and prompt payment to all other motor carriers holding such certificates, all monies due them for transportation sold over their lines by the carrier filing such bond. Upon failure of any such carrier to file such bond, he shall be cited to appear before the Commission to show cause why his certificate should not be cancelled for such failure. Effective with this Act no Certificate of Public Convenience and Necessity authorizing a motor passenger service shall be issued by said Commission unless the applicant for such Certificate shall have filed with said Commission such Ticket Reclaim Bond. In cases where it is shown to the satisfaction of the Commission that the amount of reclaim business between any motor carriers exceed $500.00 during any one month, the Commission will increase the amount of said Ticket Reclaim Bond to adequately cover such business.

Sec. 36. Effective herewith, every motor carrier holding a Certificate of Public Convenience and Necessity issued by the Commission in compliance with the provisions of this Act, shall file with said Commission a Collect on Delivery Bond in the amount of $500.00 assuring full and prompt payment to any shipper entrusting a collect on delivery shipment of goods to such motor truck operator of all monies due such shipper on such shipment, or a return within ten days of such shipment to such shipper in the event that such shipment is refused by the consignee of same, or in the event that such consignee cannot be located, it being understood that the shipper will pay the transportation charges on such shipment if it is refused or the consignee cannot be located. Upon failure of any such motor carrier to file such bond effective herewith, he shall be cited to appear before the Corporation Commission to show cause why his certificate should not be cancelled for such failure. No Certificate of Public Convenience and Necessity authorizing a motor freight service shall be issued by said Commission effective herewith unless the applicant for such certificate shall have filed such Collect on Delivery Bond.

Sec. 37. No certificate or license shall be issued by the Corporation Commission to any motor carrier until such

motor carrier shall have filed with said Commission and obtained its approval of either a surety bond or policy of insurance, issued by some company authorized to do such surety or insurance business in this State, guaranteeing the payments to the public of all losses and damages proximately caused by the negligence, malfeasance or wilful misconduct of such motor carrier, its servants or agents, in not less than the following amounts, to-wit:

For each motor propelled vehicle having a seating capacity of not more than twelve passengers . . . . . .

Minimum of $7,500 coverage for injury to any one person and $10,000 for any one accident.

For each motor propelled vehicle having a seating capacity of between thirteen and twenty passengers . . . . . .

Minimum of $7,500 coverage for injury to any one person, and $30,000 for any one accident.

For each motor propelled vehicle having a seating capacity of between twenty and thirty passengers . . . . . .

Minimum of $7,500 coverage for injury to any one person and $40,000 for any one accident.

For each motor propelled vehicle having a seating capacity in excess of thirty passengers . . . . . .

Minimum of $7,500 coverage for injury to any one person and $40,000 for any one accident

For each motor propelled vehicle operating for the transportation of property for compensation . . . . . .

Minimum of $7,500 coverage for injury to any one person and $10,000 for any one accident and a minimum of $750.00 for damages or loss to any property carried therein.

For each motor propelled vehicle used in transportation of persons or property for compensation to cover damage to property including baggage of passengers but excluding other property carried in such vehicle . . . . . .

Minimum of $1,000 coverage.

All such bonds or insurance policies shall provide a guarantee of payment of all loss or damage caused as aforesaid and shall remain in effect during insolvency of the bonded party. *Provided, however,* that the Commission may upon application made to the Commission, and upon terms and conditions to be prescribed by the Commission, permit any common motor carrier of passengers or property to carry its or their own insurance.

In addition to the above, applicant must file bond to be approved by the Commission in the amount of $1,000.00 which shall assure faithful performance of any contract or agreement of transportation negotiated or entered into by the licensee.

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ARTICLE V—FEES AND TAXES

Sec. 39. In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be assessed against and collected from every such carrier for the administration of this Act and for the maintenance, repair and reconstruction of the public highways a mileage tax which shall be computed as follows:

(a) For passenger service of any kind, including the transportation of the baggage of passengers carried in such vehicle, one eighth cent per mile for every mile traveled over the highways of this State by a vehicle of any such motor carrier having a seating capacity of seven passengers or less; one-fourth cent per mile for each such mile traveled by such a vehicle, having a seating capacity of from eight to twelve passengers; one-half cent per mile for each such mile traveled by such a vehicle having a seating capacity from thirteen to eighteen passengers; three-fourths cents per mile for each such mile traveled by such a vehicle having seating capacity of from nineteen to twenty-five passengers; and one cent per mile for each such mile traveled by such a vehicle having a seating capacity of over twenty-five passengers.

The seating capacity of each seat of such passenger vehicle, having a seating width of 32 inches or over, shall

be computed upon the basis of sixteen inches seat width per passenger.

When baggage of any kind is carried in a vehicle separate from that in which the owners thereof are carried as passengers such separate vehicle shall pay the same charge as is therein specified for freight and express service.

(b) For freight or express service of any kind, one-eighth cent per mile for each mile traveled over any highway in this State by any vehicle having a capacity of one and one-half tons or less; one-fourth cent per mile for each mile so traveled by any vehicle having a capacity of over one and one-half tons, but not in excess of two and one-half tons; one half cent per mile for each such mile traveled by any vehicle having a capacity over two and one-half but not in excess of four tons; one cent per mile for each such mile traveled by any vehicle having a capacity of over four tons, but not in excess of five tons; and one and one half cents per mile for each mile traveled by any vehicle having a capacity in excess of five tons. The ton capacity of all such vehicles shall be based, as to all trucks which have not been changed or rebuilt subsequent to their original manufacture, upon the factory list capacity thereof and upon all trailers, and all rebuilt or changed trucks upon the actual capacity thereof.

(c) Whenever any such motor vehicle is used for the transportation of both passengers and freight or express, the charges to be paid by it shall be computed upon the class of service for which the highest charge could be made against such vehicle under the provisions of this Act.

(d) For the purpose of computing the charges hereby imposed, every trailer shall be considered as a separate vehicle.

(e) Every such motor carrier which has, during any calendar year, paid property taxes in the State of New Mexico upon any motor vehicle so used over the highways in this State may apply the property taxes so paid as a credit against and deduct the amount thereof from the charges against such motor vehicle for the use of the highways by the provisions of this Act.

APPENDIX "M"

SECTION 141-234, 1929 COMPILATION
(Sec. 234, Ch. 133, Laws of 1921)

141-234. ASSESSMENT OF MERCHANDISE STOCKS.

The assessor shall ascertain the average value of stocks of merchandise for the year ending on the thirty-first day of December prior to the date of the assessment thereof, and such value shall be the value at which such merchandise shall be assessed.

In order to ascertain the average value of such merchandise the taxing authorities shall have access to all invoices made or other competent evidence that may be had to determine the same. In determining such average value, such deductions from the original cost of such merchandise shall be allowed, as may arise growing out of any conditions that will reduce the value from the original cost.

P. 5

SUPREME COURT OF THE UNITED STATES.

Nos. 772 and 898.—October Term, 1935.

Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, Appellant,

vs.

John D. Bingaman, Commissioner of Revenue for the State of New Mexico.

United States Fidelity and Guaranty Company, Appellant,

898 *vs.*

John D. Bingaman, Commissioner of Revenue for the State of New Mexico.

Appeals from the District Court of the United States for the District of New Mexico.

[May 18, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal, Judicial Code, § 238, from a decree of the district court for New Mexico, three judges sitting, 12 F. Supp. 755, dismissing the bill of complaint by which appellant sought to enjoin appellee, the state Commissioner of Revenue, from enforcing the provisions of a state law exacting a permit fee for the privilege of transporting motor vehicles over the highways of the state for purpose of sale.

The statute assailed, Chapter 56 of the New Mexico Session Laws of 1935, denies to all persons the use of the highways of the state for the transportation of any motor vehicle, on its own wheels, for the purpose of selling it or offering it for sale within or without the state, unless the vehicle is (1) licensed by the state, or is (2) owned by a licensed automobile dealer and operated under a dealer's license, or is (3) operated under a special permit issued by the state Commissioner of Revenue for its transportation. For such a permit the statute levies a fee of $7.50 if the vehicle is transported by its own power, and a fee of $5.00 if it is towed or drawn by another vehicle.

A later act, Chapter 136 of New Mexico Session Laws of 1935, provides for establishing registration stations or "ports of entry", on the main highways of the state, at which permits are to be issued and fees collected. It provides that no vehicle for which a permit is required shall receive a permit or be allowed to proceed until inspected and found to be "in safe and roadworthy condition, properly equipped with all lights, brakes and other appliances" required by state law.

Appellant, a resident and citizen of California, is engaged in the business of purchasing new and used automobiles in eastern and southern states of the United States, and transporting them, on their own wheels, over state highways to California, where he offers them for sale. He customarily transports such cars over the highways of New Mexico for a distance of about one hundred and sixty-six miles, in processions, or caravans.

Chapter 56 is challenged here, as it was below, as imposing an unconstitutional burden on interstate commerce, and as infringing the due process and equal protection clauses of the Fourteenth Amendment. Appellant also urges that the taxing provisions of this Act, enacted February 21, 1935, were repealed by the passage, a week later, of the "Ports of Entry Act", Chapter 136 of the Session Laws of 1935. The trial court held that the earlier Act had not been repealed, and construed it as exacting the permit fee for the privilege of using the state highways, and as not exempting, from the fee, cars operated under a dealers' license when transported for sale. It thought that the statute is aimed at the considerable business in the state, as shown by the record, of transporting automobiles, usually in caravans, over state highways for sale; that such transportation constitutes a distinct class of automobile traffic, which causes increased wear and tear of the highways and interferes with their safe and convenient use by others; that these circumstances justify a separate classification of the traffic for the purpose of exercising police control over it and fixing a fee or tax for the privilege of transporting automobiles over the highways in such traffic. The court accordingly held that the statute infringes no constitutional limitation on state power.

1. We see no reason, and none is suggested, for not accepting the construction of the statute adopted by the trial court. The statute applies alike to all automobiles transported for sale, whether moving intrastate or interstate. Unlike the general tax in *Interstate*

Transit, Incorporated v. *Lindsey*, 283 U. S. 183, the levy of which was unrelated to the use of the highways, grant of the privilege of their use is by the present statute made conditional upon payment of the fee. The manner of its collection, not unlike that of a toll for the privilege of entering and using the highways, definitely identifies it as a charge for the privilege. It is not shown to exceed a reasonable charge for the privilege and for defraying the cost of police regulation of the traffic involved, such as a state may impose, if non-discriminatory, on automobiles moving over its highways interstate. *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *Clark* v. *Poor*, 274 U. S. 554; *Interstate Transit, Incorporated* v. *Lindsey*, 283 U. S. 183; *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285.

The facts, as stipulated, establish that the transportation of automobiles across the state in caravans, for purpose of sale, is a distinct class of business, of considerable magnitude. Large numbers of such cars move over the highways in caravans or processions. Seventy-five to eighty per cent of the cars in appellant's caravans are in units of two, coupled together by tow bars. Each unit is in charge of a single driver, who operates the forward car and thus controls the movement of both cars by the use of the mechanism and brakes of one. Appellant's drivers, except two or three regularly employed, are casually engaged. They usually serve without pay and bear their own expenses in order to secure transportation to the point of destination, although a few receive very small remuneration and expenses. The legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than drivers of state licensed cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increase the inconvenience and hazard to passing traffic. Car trouble to any one car sometimes results in stalling the entire caravan. The state has found it expedient to make special provisions for the inspection and policing of caravans moving in this traffic.

There is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the

highways, with enhanced wear and tear on the roads and augmented hazards to other traffic, which imposes on the state a heavier financial burden for highway maintenance and policing than do other types of motor car traffic. We cannot say that these circumstances do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways.

As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. See *Clark* v. *Poor, supra; Aero Mayflower Transit Co.* v. *Georgia Public Service Commission, supra.*

Nor is it important that a part of the fees collected is not devoted directly to highway maintenance, the cost of which the state pays in part from the proceeds of a general property tax. The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. *Interstate Transit, Incorporated* v. *Lindsey, supra.* But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other.

2. It is not denied that automobiles moving in caravans, as do appellant's, constitute a class of traffic which may be taxed differently from other classes without infringing the equal protection clause. But it is insisted that such is not the classification of the statute. It is said that the statute in terms imposes the special permit fee on every automobile transported for sale, whether moving singly or in a caravan; that when moving singly a car, merely because intended for sale, presents no differences from like cars, moving for other purposes, which would afford any basis for a difference in taxation. But this argument both ignores the actual circumstances in which the statute is applied, as shown by the record, and seeks to take advantage of an alleged discrimination which, if it exists, does the appellant no harm.

There is nothing in the Fourteenth Amendment which requires classification for taxation to follow any particular form of words. If that adopted results in the application of the tax to a class which may be separately taxed without a denial of equal protection, those within the class who are called upon to pay the tax cannot complain that the taxed class might have been more aptly defined, or that the statute may tax others who are not within the class. Here it is the practice of transporting automobiles over the highways for purpose of sale which has given rise to the practice of moving them in caravans. The use of automobiles for other business purposes, or for pleasure, does not have that result. So far as it appears, the movement of cars singly for purposes of sale is negligible, and it is shown affirmatively that the cars transported for sale by appellant move in caravans. The classification of the statute thus, in its practical operation, embraces and is constitutionally applicable to cars moving in caravans, the class of traffic in which the appellant engages and on which he is alone taxed. Such discrimination as there may be is not between those who, like appellant, drive their automobiles to market in caravans and others who drive them singly, for both are taxed. Discrimination, if any, is between those who drive their cars to market singly and others who drive them for other purposes, and may be subjected to a different tax. Appellant does not assert that he belongs to either class. As the traffic in which he participates is properly taxed he cannot complain of the imposition of the tax on a business which he does not do. *Roberts and Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54, 55; *Keeney* v. *New York,* 222 U. S. 525, 536, 537; *Hatch* v. *Reardon,* 204 U. S. 152, 160, 161; Cf. *Collins* v. *Texas,* 223 U. S. 288; *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374. We have no occasion to pass upon the validity of the tax as applied to cars driven singly.

3. In the absence of a controlling decision by the state courts, we see no reason for rejecting the conclusion of the district court that the fee provisions of Chapter 56 of the New Mexico Session Laws of 1935 were not repealed by Chapter 136, passed a week later at the same session of the Legislature. As already indicated, the latter makes provision for the administration of the special permit provisions of the earlier statute. It also, by §§ 8, 6 and 13 levies a graduated mileage tax (1½ cents per mile for cars not exceeding

15,000 pounds in weight) upon motor vehicles not registered or licensed in the state, transported over the highways for purpose of sale. The statute declares that the tax is levied for the support of the administration of the Act, and for the maintenance of the highways.

Appellant does not assail this tax, but insists that it was intended as a substitute for the flat fee charged by the earlier provisions for a special permit. If the later tax, as the district court held, is imposed on motor cars transported as are appellant's, it is not inconsistent with the imposition of the flat permit fee, but supplementary to it. Repeal by implication is not favored, especially where the one act follows close upon the other, at the same session of the legislature. Cf. *Graham and Foster* v. *Goodcell,* 282 U. S. 409; *Rodgers* v. *United States,* 185 U. S. 83, 89; *Beals* v. *Hale,* 4 How. 37, 53. Moreover, the later act in this case was careful to provide that the new mileage tax which it imposes is not to apply to vehicles licensed and entitled to license plates, and otherwise taxed, under state law. The statute thus grants an explicit exemption from double taxation which it omits to extend to motor cars which, like appellant's, secure a special permit and do not receive state licenses and license plates.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.